Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MORGAN WISE,

Petitioner,

v.

WANDA WISE FRYAR,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, Eleventh District, Eastland, Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the refusal to admit DNA evidence to correct a judicial decree finding of a parent-child relationship a violation of the Fourteenth Amendment when such DNA evidence refutes the paternity of the children which was decreed by judgment based on perjury, concealment and fraud of the wife.

2. Are the Fourteenth Amendment rights being denied to the children when a court of law refuses to correct a decree of parent-child relationship based on DNA evidence that has established the false finding of paternity and thus denying the children the right of genetic heritage, inheritance and legal rights from their biological father.

LIST OF PARTIES TO PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.6

Pursuant to Supreme Court Rule 14.1(b), Petitioner certifies that the names of all parties to this proceeding appear in the caption of the Petition for Writ of Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, MORGAN WISE, petitions for Writ of Certiorari to review the judgment of the Court of Appeals for the 11th District, Eastland, Texas. The Court of Appeals opinion is reported at 49 SW3rd 450 (Tex.App. Eastland, April 26, 2001, review denied). (Pet. App. at 2a). The trial court judgment affirmed by the Court of Appeals, was published.

For brevity, reference to the parties shall be designated as "Morgan" and "Wanda".

STATEMENT OF JURISDICTION

The judgment of the Texas Court of Appeals was entered on April 26, 2001. A Petition for Discretionary Review was timely filed in the Supreme Court of Texas on May 31, 2001.

The Supreme Court of Texas denied the petition for review on July 12, 2001. (Pet. App. at 1a). The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AMENDMENT INVOLVED

Amendment Fourteen Section 1, All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

This case concerns the fundamental and constitutional issue of fairness and a judgment entered pursuant to truth rather than perjury. Morgan obtained a divorce from Wanda on September 13, 1996. The Divorce Decree did not reflect a contest concerning the paternity of the three minor boys born during the marriage relationship. At no time did Morgan have any reason or cause to believe that the three minor boys were not his biological children. He did accuse Wanda of "running around" on him during the latter two years of the marriage all of which was subsequent to the birth of the boys. Wanda even testified under oath that she had never had extra-marital affairs during her marriage and that the children were born of Morgan.

Subsequent to the divorce, due to the fact that the youngest boy suffers from Cystic Fibrosis and that Morgan was not a carrier of the Cystic Fibrosis gene, DNA testing was performed and revealed that the three minor boys were not the biological children of Morgan. (Pet. App. at 34a, 36a and 38a). Morgan sought to set aside the finding of paternity

which was never litigated by a Bill of Review based upon the fraud and mis-representation exercised by Wanda upon Morgan. (Pet. App. at 16a). DNA evidence should be admitted to set aside the finding of paternity in the Divorce Decree. DNA evidence has set aside criminal convictions of innocent defendants and, likewise to deny subsequent DNA evidence in a civil proceeding is to deny Equal Protection of the law.

Morgan is under court order to pay child support for children that were not his biologically. Such order of child support was obtained through the conspiracy of Wanda and the biological father of the children, as well as, the perjury and fraud committed by Wanda in the court proceedings. The three minor boys have been denied rights to know or to attempt to ascertain the biological father in order that they may have the right to genetic history, inheritance, court recovery or governmental benefits should the same be warranted pursuant to social security laws. The three minor boys in effect have less rights than that of a illegitimate child who can inherit from his biological father and obtain genetic history, as well as, as an adopted child who likewise has the rights to inherit from its biological father. The three minor boys are thus denied Equal Protection of the law and Morgan is denied Due Process of law for the wrongfully taking of monies and support obligations obtained through fraud.

The Texas Court of Appeals and the Texas Supreme Court by denying discretionary review have fostered fraud and perjury by continuing to insist upon the finality of judgement even in light of the deception exercised by Wanda. The Texas courts have designated such fraud as being intrinsic fraud with the assumption that paternity was litigated in the divorce proceedings when in fact such litigation did not take place. The Texas courts in maintaining and condoning the legal myth of intrinsic fraud as opposed to extrinsic fraud results in judgments not representing the truth and fairness of

our system of judicial review of our society. Other states, sanctioned by the Supreme Courts of such states, refuse to follow this false myth which the Texas Courts follow. Such judgments are corrected to reflect the truth. Morgan and the three minor boys are denied the protection of the Fourteenth Amendment to the United States Constitution.

B. Factual Background

Morgan and Wanda were divorced on September 13, 1996. The Divorce Decree found that the Morgan and Wanda were the parents of the following children, Carli Ann Wise, Rowdi Morgan Wise, Marti Eugene Wise and Rauli Tabor Wise. Subsequent DNA testing by report dated March 18, 1999, established that Morgan's probability of paternity of the three boys was zero. (Pet. App. 34a, 36a, and 38a).

The minor child Rauli, was diagnosed with Cystic Fibrosis and Morgan was advised to obtain DNA testing to verify the paternity of the child as Morgan was not a carrier of the C.F. gene.

Wanda's testimony in a January 25, 1996 hearing, reflected that Wanda in answer to a direct question from her attorney, "have you ever had extra-marital affairs with any man during your marriage" and her answer was "no". (Pet. App. at 44a). Wanda testified that Morgan had four children and that the four children were his kids.

Contrary to this perjured testimony, on April 15, 1999, Wanda testified under direct examination that she had sexual relations with a Dwayne Alexander nine months prior to the birth of each of the three boys and that he could possibly be the father of each of them. Morgan at all times during the marriage believed that he was the father of all the children. Contrary to the Court of Appeals finding, Morgan was *not* aware that Wanda was having affairs with at least six men during their marriage in two different cities.

There was never any litigation as to the question of the paternity of the children, nor that he had any suspicion that she was seeing anyone. Morgan relied upon the trust and knowledge of his wife and the faith that he had for her during their marriage. Wanda always confirmed that the children were his and he relied upon this fiduciary relationship of truth.

At the Bill of Review hearing Morgan further re-iterated that he did not believe his ex-wife, Wanda, was seeing anybody in 1988 and 1990 and the first part of 1992 and the tail end of 1991 which would be the nine months prior to the birth of the three minor boys. Prior to the September 1996, Divorce Decree, he had no knowledge of her seeing anyone other than in the last two months of 1995 which was after the birth of the minor boys.

Morgan reserved his Constitutional issues at the Bill of Review hearing and reminded the Judge of the same as well as the fact that Morgan had a meritorious defense and that there was no fault upon his part. The Court limited the hearing to the fraud issues. Morgan preserved his Constitutional issues at a subsequent hearing on April 27, 2000 and his trial court pleadings preserved his Fourteenth Amendment Constitutional rights. (Pet. App. at 23a). Morgan sought to correct the finding of paternity in the Divorce Decree by way of a Bill of Review, individually and on behalf of the three minor boys in order that the true biological father of the children may be established and that true paternity be obtained. The trial court denied all relief.

1. *The Decision Below*

The Texas Court of Appeals subsequently reviewed the trial court's ruling and affirmed the trial court's denial of the Bill of Review and found that the fraud was extrinsic. The Texas Courts failed to recognize that even though a Divorce Decree states that there is a finding of paternity that it was

therefore assumed that the paternity of the children are litigated in every divorce proceeding. On the contrary, that is not reality. Paternity is not litigated for the reason that the husband in such divorces has no reason to dispute paternity of the children unless the wife either tells him that he is not the biological father or that he is incapable of fathering the children due to sterility. Texas courts imply that one must assume that if the wife at any time in the marriage even after the birth of the children had any type of extra-marital affair then therefore it must be assumed that the paternity of all children born of the marriage regardless of time would be suspect. The Texas Courts are in conflict with numerous states of the United States which recognize the truth of DNA testing.

The Texas Court of Appeals recognized the federal constitutional rights of Due Process and Equal Protection but stated that the denial of the Bill of Review was not a denial of these federally constitutional rights. (Pet. App. at 9a). The Texas Court of Appeals further denied any redress to the three boys by stating that the boys were not parties to the challenged decree and did not have standing. The effect of this ruling by the court forecloses actions by the boys to seek their constitutional rights the same as an illegitimate or adopted child and the rights to obtain inheritance and genetic history.

The Texas Supreme Court denied the Petition for Review with no opinion. (Pet. App. at 1a).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The State Of Texas By Assuming That Ever Issue In A Divorce Decree Is Litigated Perpetrates A Fraud. Stating That The Decree Of Paternity Can Not Be Set Aside When Dna Evidence Establishes The Truth Of Paternity Sustains A Judgment Obtained Through Perjury, Deceiptfullness And Fraud In Violation Of The Fourteenth Amendment To The United States Constitution. The State Of Texas' Reliance Upon The Distinction Between Extrinsic And Intrinsic Fraud Conflicts With The Court Decisions And The Laws Of Other States. Other States Recognize That Finality Of Judgment And *Res Judicata* Do Not Bar The Setting Aside Of A Judgment Which Does Not Reflect The Truth.

The Texas Court of Appeals holding that the perjury and fraud committed by Wanda is intrinsic fraud and thus renders a judgment res judicata constitutes a travesty of justice. This ruling encourages and fosters deceiptfullness by a mother in a marriage relationship to lie and perjure herself in order to establish the presumed father of the children. If a wife can lie until a divorce decree is entered, she is thus protected by the courts to perpetuate the lie as to the alleged biological father of the children. The result is the wife/mother thus dictates the family relationship thus denying due process to the presumed biological father/husband and also denies her own children the right and knowledge of knowing their biological father for genetic and inheritance rights.

The Court of Appeals of Tennessee, *White v Armstrong*, 1999 WL 33085 (Tenn. Ct. App. January 27, 1999) recognized that the Petitioner over three years after voluntarily legitimizing the child had the right to terminate his responsibility to support the child based upon genetic testing which excluded him as the child's biological father. The Tennessee court recognized that the Petitioner was entitled to

post-judgment relief because it was no longer equitable that the legitimization order be given prospective application. The Court further recognized that the equitable principles conflicted with the policy of disfavoring re-opening cases after they have become final; the policy disfavoring granting relief to persons who come into court with unclean hands or who are responsible for their own misfortune; and the third policy requiring biological parents above anyone else to assume the responsibilities to support their children. The Court of Tennessee felt that the third policy that of requiring the biological parent to assume responsibility to support their children should take precedent over the first two conflicting policies. The Tennessee court cited their Rules of Civil Procedure that permits the court to relieve a party from final judgment when "it is no longer equitable that the judgment should have prospective effect".

The Tennessee Court recognized *DeFilippis v United States*, 567 Fed.2d 341, 343-44 (7th Cir. 1977) that this sort of relief is appropriate when a change of circumstances had occurred that would render continued enforcement of the judgment inequitable. The Tennessee Court further relied upon the statement of Justice Cordoza "a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong". *United States v Swift & Co.*, 286 U.S. 106, 114-15 (52 S.Ct. 460, 1932). The Tennessee court held that it is of overriding importance that one conclusively established in law not to be the father of a child be not declared as the father and to relieve a man from the prospective operation of a child support order when conclusive proof established that he was not the father of the child.

Denial of Due Process of Law and Equal Protection of law is being denied to Morgan by the continual enforcement of a judgment which was obtained wrongfully due to no fault upon

Morgan's part and being enforced through the Courts of Texas which do not recognize the equity principle as set down by the United States Supreme Court and the Courts of our sister states. The Supreme Court of the United States in *Lehr v Robertson*, 463 U.S. 248, 103 S.Ct. 2985, (1983) addressed the issues to be decided when the Fourteenth Amendment and the Due Process Clause is invoked. The Court stated that when this Clause is invoked it is the Court's practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. *Id.* 256. The Court must first consider the nature of the interest in liberty for which the Petitioner claims constitutional protection then address the adequacy of the procedure of the state in providing for such protection.

The Supreme Court has addressed the Due Process and Equal Protection laws in numerous cases primarily dealing with that of a biological father in the relationship to his children or the conflicting claims of two natural parents and the adoption by step-parents. The Court has traditionally reviewed the relationships between the children and the parents.

This case is a first impression of a presumed legal parent who is seeking to dis-establish such legal relationship due to a finding of non-genetic paternity. Important family relationship in this case has been destroyed by the acts of the wife/mother in her deceitfulness which has resulted in the injustice to Morgan and the three boys. The State of Texas is violating the Fourteenth Amendment by the enforcement of a legal relationship based on fraud and deceitfulness. The rights of Morgan are the reciprocal of that of a biological parent seeking relationship with his child. Morgan is entitled to such equal protection to dis-establish such a relationship as that of those seeking to establish a relationship.

The U.S. Supreme Court in *Lehr* further stated that the concept of equal justice under the laws requires the State to

govern impartiality. *Id.* 264. The State may not subject men and women to disparate treatment when there is no substantial relationship between the disparity and important purpose. Texas as well as the federal courts and other states recognize that DNA evidence may be admitted to overcome a criminal conviction. The admission of such DNA evidence in a criminal proceeding to correct an injustice is equal and comparable to the admittance of DNA evidence in a civil proceeding to set aside a finding of parent-child relationship when such biological relationships is an impossibility.

The Supreme Court of Wyoming has held that the doctrine of res judicata, collateral estoppel and judicial estoppel did not bar a trial court from granting relief from paternity. *State of Wyoming Dept. of Family Services, MJJ v PAG and MJA*, 934 P.2d 1257 (Wy.1997). The mother had told a putative father that he was in fact the father of an expected child. At the time of the delivery of the child he signed an affidavit acknowledging his paternity and a decree of paternity was entered. Within a year after the entry of the decree of paternity, the putative father filed his motion to set aside the finding of paternity based on the grounds of fraud and excusable neglect. The reasons for the mother's deception was her desire to protect the man she actually thought to be the father because he was married. The Department of Family Services of Wyoming urged that there was no sufficient showing of fraud or excusable neglect to support the finding for relief from the judgment of paternity. The Supreme Court reviewed the Rules of Civil Procedure which provided for relief from final judgment including fraud whether denominated as intrinsic or extrinsic fraud as a misrepresentation or other misconduct of the adverse party. The court found that the false representation did induce the putative father to execute the affidavit of acknowledgment of paternity because he reasonably believed it to be true and it was further reasonable to believe that the putative father did not contest the same until he was made aware of the facts to

the contrary. The putative father relied upon the false representations of the mother and upon discovery of the falsehood he acted diligently in seeking the reversal of the acknowledgement of paternity and relief of the court and the Supreme Court affirmed the trial court in vacating the judgment of paternity.

The Supreme Court of South Dakota recognizes that a judgment of paternity may be vacated and that the putative father may bring an action against the mother of the child seeking recovery of monies withheld from the putative father's wages for support of the child after the paternity judgment was vacated upon blood tests that established non-paternity. *Kohl v Amundson*, 620 NW2d 606 (S.D. Jan. 3, 2001). The Supreme Court held that the mother was statutory liable to the putative father for the monies withheld and further, in addition to the statutory provisions which entitled such relief, the putative father was entitled to recover under the principles of equity. It is a general principle of equity that one party shall not be enriched at the expense of another party. *AG Edwards & Son v Norwest Realty Co.*, 340 NW2d 187, 189 (S.D. 1983). Even with a default judgment declaring paternity to the putative father, the Court recognized the DNA blood test to vacate the judgment and allowed the current case to petition for reimbursement.

The Supreme Court of Nevada addresses the issue of fraud in decisions of paternity. The State of Nevada recognizes the finality of judgment similar to that of Texas. When a claim is fraudulently advanced and that fraud is so successful that the other party is not aware that he has a particular claim or defense, the court recognizes that this may be sufficient basis for an equitable relief from the judgment. *Love v Love*, 114 Nev. 572, 959 P.2d 523 (Nev. May 19, 1998). The court acknowledges the case law that which keeps one party away from court by conduct preventing a real trial on the issues is extrinsic fraud and forms a sufficient basis for equitable relief

from the judgment. *Libro v Walls*, 103 Nev. 540, 543, 746 P2d 632, 634 (Nev. 1987). In the *Libro* case the husband did not challenge the paternity during the divorce proceeding. The Court reversed the trial court which ruled that the husband could not raise nonpaternity as a defense to a judgment for child support arrearages. The Supreme Court noted that the wife's failure to notify the husband that he might not be the child's father prevented him from having a fair opportunity to litigate the paternity in the divorce proceedings.

In the *Love* case the husband did not challenge paternity in the original divorce proceeding. The Judgment would ordinarily be res judicata between the parties but the Supreme Court of Nevada held that res judicata did not bar the husband from proving non-paternity because of the possible presence of extrinsic fraud in the original proceeding. A genuine issue of material fact existed as to whether the wife fraudulently concealed the child's parentage. On remand, the district court must, as a threshold matter, determine whether the original judgment was procured by fraud.

Legislation has been passed by the State of Maryland authorizing the setting aside of paternity based upon genetic testing. The highest court of the State of Maryland in *Langston v Riffe v Langston, Daniel R. v Tyrone W.*, 359 Md.396, 754, A.2d. 389 (June 28, 2000) sustained the constitutionality of the statute to set aside or modify a paternity action if genetic testing established the exclusion of the individual named as the father. In addition to sustaining the statute, the Court further held that the best interest of the child standard has no place in a proceeding to reconsider a paternity declaration. The Court of Appeals of Maryland cited other state courts reflecting the remedial aspect of establishing the true paternity of a child and discussed the genetic inheritance and other rights of a child from a biological father.

Likewise, the Supreme Court of Alabama has recognized that the Alabama statute that allows an individual who has been declared the legal father to re-open the case if there is scientific evidence presented that such individual is not the father. *Jenkins v MAB and JB*, 723 So.2d 649 (Ala. July 17, 1998). The putated father executed an acknowledgment of paternity and paternity judgment became final in 1986. In 1995 the putative father invoked the statute of Alabama that allowed a previously adjudicate father who obtained blood test or DNA evidence indicating that he was not the biological father to re-open a final judgment of paternity. The question was raised as to the retroactive effectiveness of such statute and if the petition to re-open was filed within a reasonable time. The Supreme Court held that a 5 year limitation period did not bar the action to establish the non-existence of paternity and that a paternity judgment may be re-opened under a separate legislative rule. The putative father should be entitled to relief.

The Federal Rules of Civil Procedure Rule 60(b)(3) (Pet. App. 45a) recognizes that a court may relieve a party from a final judgment based upon fraud whether heretofore dominated as intrinsic or extrinsic and for any reason justifying relief from the operation of judgment. The District Court of the Virgin Islands *AP v Government of the Virgin Islands*, 961 F.Supp. 122 (April 2, 1997) recognized the relief under Rule 60(b)(6) (Pet. App. at 45a) according to United States Supreme Court in the case of *Kalpprott v United States*, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390-91 (1949) which stated that relief should be granted when "appropriate to accomplish justice". The District Court reversed the territorial court of the Virgin Islands which denied the putative father's motion to set aside a finding of paternity. The putative father obtained the results of a blood test which conclusively excluded the putative father as the child's father. He thereupon filed his motion for termination of support payments and the setting aside of the paternity judgment. The

District Court held that the territory court would be required to hold a full evidentiary hearing as to whether or not the father was entitled to relief from the judgment on grounds of extra-ordinary circumstances.

Even the Texas Supreme court has stated that a fiduciary concealment of material facts, used to induce an agreed or uncontested judgment which prevents a party from presenting at trial his legal rights is extrinsic fraud. *Montgomery v Kennedy*, 669 SW2d 309 (Tx.1984). Extrinsic fraud is that fraud which denies the losing litigate the opportunity to fully litigate his rights or defenses upon trial. *Id.* 312. The Court stated that the controlling question is always whether the alleged fraud prevented the party from knowing about and presenting his legal right at trial. *Id* 314. The *Montgomery* case reflected that a brother had failed to disclose the existence of an oil and gas lease. This lease constituted part of the assets which were being litigated between a brother and sister. The concealment of such lease constituted extrinsic fraud to the fiduciary relationship that the brother owed to his sister. The Court granted the Petitioner's Bill of Review.

Is not the pro-creation of children of a marriage at least equal to property rights in an estate dispute? The paternity of the children by Morgan was never litigated in the divorce proceeding and has not been subjected to cross-examination. For the Texas Courts to state that paternity was litigated by the findings in the divorce decree is not to accept reality.

The Texas Courts have held that the fiduciary exception to the technical requirement of extrinsic fraud for the purposes of a Bill of Review have become more prevalent with regard to the non disclosure of financial assets in an divorce. *Rothmill v Morrison* 732 SW2d 6 (Tx. Ct. App.-Houston, 1987, no writ); *Ragsdale v Ragsdale*, 520 SW2d 839 (Tx.Ct.App.- Ft. Worth, 1974, no writ). The concealment of marital property is considered extrinsic fraud for purposes of

Bill of Review even if the actual concealed matters were themselves contested and litigated.

Is not then the marriage relationship also a fiduciary one? The concealment of the parentage of Morgan's three sons is a breach of this fiduciary duty. Fraud exercised by Wanda is thus extrinsic fraud comparable to the concealing of marital property rights and the Due Process of law requires that Morgan obtain relief from the paternity judgment. The concealing of the true parentage of children is at least comparable to the concealment of marital assets in a divorce proceeding.

The States of Iowa and Ohio both enacted civil statutes wherein a putative father may bring an action to declare the non-existence of the parent-child relationship after adjudication of paternity in any judgment. (Iowa Code Chapter 600B, Paternity and Obligation for Support; Ohio Revised Code Chapter 3119.962 Relief From Final Judgment, Court Order, or Administrative Determination). These statutes rely upon the DNA evidence that states non-paternity. Texas has no such statutes but Morgan should not be denied relief from a finding of paternity even though the State fails to pass such statute when such paternity is based upon a judgment obtained through perjury, fraud and deceit.

The Texas Court of Appeals cited the Massachusetts Supreme Court *In re Paternity of Cheryl*, 746 NE2d 488 (Mass. April 24, 2001) by stating that this case reached the same result as the Texas case. The Massachusetts ruling is distinguishable as the putative father did not raise constitutional issues. Such putative father had signed a statement of paternity and had been offered DNA testing before acknowledging paternity but refused the same. He waited several years before challenging the paternity judgment and during such time by his own admission he had reason to believe that he was not the child's father. The putative father failed to even take action to set aside the paternity even when

the mother unequivocal confirmed that he was not the biological father.

The Massachusetts Court failed to set aside the finding of paternity judgment because of the consequences of the father's long delay to challenge such judgment. The Massachusetts Court did recognize *Dixon v Punchy*, 979 P.2d 520, 526 (Alaska 1999) wherein genetic tests confirm the father not the biological parent and that the claim was brought two and half years after the divorce which was not unreasonable as a matter of law to grant relief from prospective application of the Divorce Decree.

Morgan in contrast challenged his paternity judgment upon learning the results of the DNA testing. He had no knowledge of the possibility that he was not the biological father of the children and on the contrary, Wanda had at all times stated that he was the biological father. Morgan had no reason to perform DNA testing in 1996. Under Texas law and the majority of the laws of all states, the husband of a mother who has given birth to a child is considered the presumed biological father of such child. There is no doubt that the mother is the biological mother. The father is only presumed due to the fact that he is married to the mother. Is not the father of a marriage being denied Due Process of law and Equal Protection of the law by the establishment of such presumption? To overcome such presumption he must deny the paternity or as a minimum seek scientific testing to determine such paternity. The paternity should not be a burden solely placed upon the father. The mother does not face such burden for she is not required to designate or swear as to the father of her children. Thus, there is per se unequal treatment between the wife and the husband.

The Texas Supreme Court has discriminated against Morgan as a presumed biological father who seeks to set aside this finding of paternity as compared to a biological father who is found to have standing to rebut the marital pre-

sumption and to claim his parental rights by establishing his paternity. The Texas Supreme Court *In the Interest of J.W.T*, 872 SW2d 189 (Tx.1995) found that the biological father had standing to establish his paternity relationship with his biological children even though such children were born of a marriage. The Texas Supreme Court stated that "permitting the scientific truth about paternity to govern legal relationship between real people affected by court rulings promotes certainty and stability". *Id.* 194. The Court further stated that the state should not perpetuated the myth of "presumption of paternity" so as to deprive the biological father of being able to exercise his rights as a parent. *Id.* 197. The Texas Supreme Court and the Texas Court of Appeals in denying review are thus perpetuating this myth of paternity totally contrary to scientific principles and the truth and in violation of the U.S. Constitution.

The Court's do not want to disturb a family relationship. But if the family relationship is based upon fraud and deceit, the family relationship as defined by the court order does, not exist and if it does not exist then the marriage contract between the parties is void and the obligation of support of non-biological children should likewise be void. The obligation of child support and support of a non-biological child is separate and distinct from a relationship between someone who has possession or a strong relationship with the minor child. Such relationships are governed by other provisions of the Family Code and the bonding or paternal relationship between the parties may continue absence the child support being paid to the mother. The Court may foster a strong structure of emotional relationship between the father and the child but this relationship is obviously going to be jeopardized by the further obligation for the father to support that child financially knowing full well that the child is not his biological child. Further, forcing the non-biological father to pay for such child allows the true biological father to not be

responsible for his actions and such biological father avoids the obligation to support his pro-creation.

II. In Failing To Set Aside A Finding Of Paternity Which Does Not Exist In Fact Deprives The Children The Right To Determine Their Biological Father And Their Right To Obtain Genetic Heritage, Inheritance And Their Legal Rights From Such Biological Father. As The Texas Courts Have Established The Presumed Legal Father As The Father, There Is No Recourse For The Minor Children To Seek The Biological Father. Judgment Of Paternity Is Res Judicata To Any Further Actions And Bars The Actions Of The Minor Children.

Unless the decree of paternity in the divorce judgment between Morgan and Wanda is not set aside, Morgan is unable as next of friend of the minor children to proceed in a cause of action against their biological father.

In *Clark v Jeter*, 486 U.S. 456, 108 S.Ct. 1988, the Court held that in Pennsylvania law that an illegitimate child must prove paternity before seeking support within 6 years of the illegitimate child's birth is unconstitutional under the Equal Protection and the Due Process Clause of the Fourteenth Amendment. A legitimate child may seek support from the parent at any time and thus there was discrimination between a legitimate child and the illegitimate child. Under Texas law an illegitimate child or an adopted child may inherit from their biological father. The legitimate child of a marriage wherein the father is not the biological father of such child denies such legitimate child the right to inheritance and support from the biological father. As the legitimate child has a legal father and until the finding of paternity is set aside such legitimate child may not seek knowledge of the biological father, nor its rights from the biological father.

This violates the Equal Protection and Due Process clause of the Fourteenth Amendment.

The U.S. Supreme Court has likewise held unconstitutional to discriminate between illegitimate children and legitimate children. *Mills v Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549 (1982) and *Gomez v Perez*, 409 U.S. 535, 93 S.Ct. 872 (1973).

> "Choices about marriage, family life and the upbringing of children are among associational rights this Court has ranked as "of basic importance in our society", rights sheltered by the Fourteenth Amendment against the State's unwarranted, usurpation, disregard or disrespect".

M.L.B. v S.L.J., 519 U.S. 102, 117 S.Ct. 555, 564 (1996).

The best interest of the three boys is not being represented by Wanda or the ad litem for to do so would to disclose fraud and deceit exercised by Wanda. The Texas Supreme Court recognized the right of a child over the age of one to institute paternity action even though a statute stated that such action must be commenced before the child is one year of age. *Dickenson v Simpson*, 807 SW2d 726 (Tx. 1991). The Texas Supreme Court stated that such statute was unconstitutional in violation of the Equal Protection laws. The Texas Supreme Court further in *Purcell v Bellinger* 940 SW2d 599 (Tx. 1997), held that a child may establish paternity when the child's interest were not adequately pursued in a previous action that concluded in a final judgement.

The minor boys rights are not being protected by their mother and the Texas Court of Appeals in this case has failed likewise to protect such children by stating that they had no standing to contest the Bill of Review. The Austin Court of Appeals in *B.M.L. v Cooper*, 919 SW2d 855 (Tx. Ct. App.-Austin, 1996, no writ) stated that it has become more compelling as science and blood testing, with DNA screening becoming more precise and dispositive, that the establishment of paternity can outweigh the societal interest of finality of judgment. *Id.* 861. The Court must be particularly sensitive

in responses to evidence tending to rebut the presumption that the child's best interest will be protected by an authorized petitioner in a paternity suit especially when the child's best interest was not adequately protected in the prior suit. *Id.* Wanda does not want to determine the true biological father and the attorney ad litem failed to protect these interests of the children. Truth is thus hidden by actions of those who represent the boys, save and except, Morgan, who seeks to set aside the findings of paternity and to establish paternity in subsequent proceedings.

Texas Supreme Court has stated *In the Interest of J.W.T.*, 872 SW2d 189 (Tx. 1995) that the children should not be denied the right of knowing their biological father, their genetic history, the right of inheritance, or any legal rights to which the children may be entitled by the defining of the biological father and that the biological mother should not be the one to determine the definition of the family and who the biological father of the children is to be. Morgan's minor boys, are entitled to the same access to the Courts to determine paternity and to genetic information as any other individual whether they be adopted or illegitimate children.

Section 160.007 of the Texas Family Code (Pet. App. at 46a) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Morgan's children have been singled out as a class, namely children of a marriage where paternity has not been litigated. These children are denied access to the court's in order to determine the genetic history or other legal rights attended to paternity determination. Section 160.007 does not provide any safeguards that the child's present, future legal rights are adequately protected at the time the divorce decree was entered adjudicating Morgan as the biological father. Such children are being discriminated against. The Equal Protection Clause of the United States Constitution must guarantee equal rights to children born of the marriage as those children not born of the marriage.

CONCLUSION

The disparity in rulings by Supreme Court's of other states and the denial of the right of putative father to introduce DNA evidence to set aside a paternity judgment based upon fraud and deceit in violation of the Fourteenth Amendment to the United States Constitution is of such social significance that a Writ of Certiorari must be granted. Writ must additionally be granted in order to protect all children born of a marriage wherein the father is not the biological father of such children to insure that such children may preserve their genetic history, inheritance and rights derived from the biological father.

Respectfully submitted,

ROBERT D. MILLER *
608 Scurry
Big Spring, Texas 79720
(915) 267-7449
Attorney for Petitioner

* Counsel of Record

APPENDIX A

[SEAL] THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

Case Number: 01-0463
Court of Appeals Number: 11-00-00196-CV
Trial Court Number: 99-06-40563A

MORGAN WISE,

v.

WANDA WISE FRYAR.

July 12, 2001

Mr. John Henry Rheinscheld
306 Scurry Street
Big Spring, TX 79720

Mr. Robert D. Miller
608 Scurry Street
Big Spring, TX 79720

Ms. Phyllis Butler Royal
P.O. Box 4774
Odessa, TX 79760

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T Adams, Clerk
By /s/ Tanya R. Hunter
TANYA R. HUNTER, Deputy Clerk

cc: Ms. Sherry Williamson, Clerk
Ms. Glenda Brasel

APPENDIX B

11TH COURT OF APPEALS
Eastland, Texas

No. 00-00196-CV
Appeal from Howard County

MORGAN WISE,
Appellant,

vs.

WANDA ELAINE WISE FRYAR,
Appellee.

OPINION

The question before this court is one of procedure. In 1999, appellant brought a bill of review challenging the trial court's final 1996 decree of divorce in which appellant was found to be the father of four children and in which appellant was awarded custody of all the children. In order for the trial court to be able to reach the merits of his arguments, appellant first had to prove that he was entitled to present his claims by a bill of review. The trial court found that he did not; therefore, the bill of review was denied without reaching the merits of appellant's claims.

The threshold issue before this court is whether it was error to deny appellant's bill of review. Because appellant did not establish that he was entitled to proceed with a bill of review, the trial court did not err, and the judgment is affirmed.

A bill of review is a unique equitable remedy attacking a final judgment; and, as such, Texas law provides that the remedy is available in limited situations. The Texas Supreme Court in *Alexander v. Hagedorn*, 226 S.W.2d 996 (Tex. 1950), announced the general rules for a bill of review and

explained why a bill of review is appropriate only in exceptional circumstances:

> Because it is fundamentally important in the administration of justice that some finality be accorded to judgments, these essentials have been uniformly recognized by our courts; therefore, bills of review seeking relief from judgments "are always watched by courts of equity with extreme jealousy, and the grounds on which interference will be allowed are narrow and restricted"; and the rules are not to be relaxed merely because it may appear in some particular case that an injustice has been done. *Harding v. W. L. Pearson & Co. et al.*, Tex.Com.App., 48 S.W.2d 964. As said by the Supreme Court of California, "Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice." *Pico v. Cohn et al.*, 91 Cal. 129, 25 P. 970, 971, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep.159.

Alexander v. Hagedorn, supra at 998; *Bristow v. Bristow*, 834 S.W.2d 497 (Tex.App.—Eastland 1992, no writ).

The parties in this case, Morgan Wise and Wanda Elaine Wise Fryar, were married in August 1983. Four children were born during their marriage: a girl in 1985 and three boys in 1989, 1991, and 1992. Wanda filed an original petition for divorce on January 10, 1996. Shortly thereafter Morgan filed a cross-petition for divorce seeking appointment as sole managing conservator of all four children. Both Wanda and Morgan alleged that they were the parents of all four of their children. The jury determined that Morgan should be appointed sole managing conservator of all four children. The trial court signed the final divorce decree on September 13, 1996, dissolving the marriage, determining that Wanda and Morgan were the parents of all four children, and appointing Morgan sole managing conservator of all four children. The divorce decree was not appealed.

Morgan remained sole managing conservator of the children until January 19, 1999, when he and Wanda agreed to modify custody. On March 2, 1999, Morgan-filed a petition to again modify the parent-child relationship by seeking temporary orders appointing him sole managing conservator for the couple's youngest son and by alleging that the child's "present living environment may endanger the child's physical health or significantly impair the child's emotional development." Morgan contended that, since the agreed modification to custody, his youngest son had not received the necessary medical treatment for the child's cystic fibrosis, that the child at that time was hospitalized with pneumonia as a result, that the child's health appeared to "be going downhill," and that Wanda could not "treat this child the way the child should be treated for Cystic Fibrosis."

Three months later on June 17, 1999, Morgan filed the original petition for bill of review attacking the divorce decree by alleging for the first time that the three boys were not his biological children and that Wanda not only failed to disclose her "extra-marital affairs" but also "concealed a material fact": the identity of the father. Morgan amended his petition for bill of review to include a petition to establish paternity and tort claims of fraud and conspiracy. Morgan later filed a motion to sever his bill of review claims from these other claims. The motion was granted.

On March 28, 2000, the trial court conducted a hearing on Morgan's bill of review. Morgan testified that, while Wanda was pregnant with their first child, there was an "incident" between Wanda and a man she worked for. Morgan stated that, while their first child was still in diapers, he found a card written by Wanda to another man. Morgan testified that:

> It just said—stated that, "Your parents were nice," that she met her—met his parents, and that they spent, you know, I guess, the day together and—you know, with [Morgan and Wanda's daughter], because she

> mentioned, you know, that—with [Morgan and Wanda's daughter] there. And at the bottom was that "If you will take [Morgan and Wanda's daughter] and I, I will leave Morgan."

Morgan further testified that he found this card prior to the birth of the three boys, that he talked to Wanda about the card, that they "worked it out," that he did not remember the specifics of their conversation, and that he had not assumed that Wanda was having sex with the man to whom the card was addressed. Both in his deposition taken at the time of the divorce and at the bill of review hearing, Morgan acknowledged that "[s]omething had to go on for her to just want to get up and leave me." Morgan alleged in his amended bill of review that this man was the biological father of the three boys.

Morgan also testified that, at the time of the divorce, he did not see a need for paternity testing and that his attorney did not advise him "either way" about paternity testing. Morgan testified about Wanda and a man from Oklahoma but stated that he did not know if there had been a sexual relationship between the man and Wanda. Morgan identified a handwritten document as a list of psychological abuses he had suffered. Morgan testified that he had prepared the list for his attorney during the divorce. The first three items read: "Embezzling money from employer. Her affairs in Abilene. Her affairs in Big Spring." At the bill of review hearing, Morgan testified, "That's what I call them was affairs. I didn't go in depth as far as—but I didn't know that any sexual relationship— no, I did not." Morgan stated that, while he could speculate, he had never known what happened during Wanda's "affairs." Morgan identified six different men with whom, at the time of their divorce, he was aware that Wanda had had "affairs" with during their marriage.

Morgan further testified that he had had no reason to question paternity until after he received the results of a cystic

fibrosis screen in March 1999. Morgan stated that, in order for the youngest child to be his biological child, Morgan would either have to have cystic fibrosis or have to be a carrier. Morgan testified that he did the test because he did not have cystic fibrosis and because he wanted "to see if [he] was a carrier of cystic fibrosis." Morgan said that the results showed that he was not a carrier of cystic fibrosis.

The law in Texas is well-settled concerning when a bill of review is appropriate. *Tice v. City of Pasadena*, 767 S.W.2d 700 (Tex. 1989) (original proceeding); *Transworld Financial Services Corporation v. Briscoe*, 722 S.W.2d 407 (Tex.1987); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex.1984); *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex.1979); *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240 (Tex.1974); *Alexander v. Hagedorn, supra.* A bill of review is an independent equitable attack on a judgment which has become final because the time for filing a motion for new trial or for appealing the judgment has passed, and it is brought by a party to the final judgment. *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe, supra*; *Montgomery v. Kennedy, supra*; *Baker v. Goldsmith, supra*; *Alexander v. Hagedorn, supra.* In order to successfully attack the final judgment, the petitioner must allege and prove (1) a meritorious defense to the cause of action alleged to support the judgment (2) which the petitioner was prevented from making by fraud, accident, or wrongful act of the opposite party (3) unmixed with any fault or negligence of the petitioner. *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe supra*; *Montgomery v. Kennedy, supra*; *Baker v. Goldsmith, supra*; *Petro-Chemical Transport, Inc. v. Carroll, supra*; *Alexander v. Hagedorn, supra.*

Before the merits of his assertions can be reached, Morgan must first establish that he was entitled to the extraordinary relief of a bill of review under Texas law. Morgan failed to

meet this threshold requirement. In particular, Morgan did not establish that his failure to pursue paternity during the 1996 divorce proceedings was without negligence or fault on his part and was due to extrinsic fraud.

In 1983, 13 years before the divorce proceedings in this case, the Texas Legislature amended the Texas Family Code to allow a man the means to deny the paternity of a child born or conceived during the man's marriage. Former TEX. FAM. CODE § 12.06 (1983) now TEX. FAM. CODE ANN. § 160.101 (Vemon Supp. 2001). When he filed his cross-petition for divorce, Morgan could have elected to challenge the paternity of any or all of the four children born during his marriage to Wanda. The record reflects that, at the time of their divorce, Morgan was aware not only of what Morgan described as Wanda's "affairs" in two cities and of her offer made prior to the birth of the three boys to leave Morgan for another man but also that Wanda had had these "affairs" with at least six men during their marriage. Instead of contesting paternity, Morgan chose to seek appointment as sole managing conservator of all four of the children born during his marriage to Wanda.

The type of fraud which the petitioner must allege and prove is "extrinsic" not "intrinsic." *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe, supra*; *Montgomery v. Kennedy, supra*; *Alexander v. Hagedorn, supra*; *Bristow v. Bristow, supra*. The court in *Montgomery v. Kennedy, supra* at 312-13, explained the difference between extrinsic and intrinsic fraud as follows:

> In relation to attacks on final judgments, fraud is classified as either extrinsic or intrinsic. Only extrinsic fraud will entitle petitioners to bill of review relief. *Alexander v. Hagedorn, Id.* at 574, 226 S.W.2d at 1001.
>
> We have stated or expressly approved that extrinsic fraud is that fraud which denies a losing litigant the opportunity to fully litigate his rights or defenses upon

trial. *Id.* Extrinsic fraud is "collateral" fraud in the sense that it must be collateral to the matter actually tried and not something which was actually or potentially in issue in the trial. *Crouch v. McGaw*, 134 Tex. 633, 639, 138 S.W.2d 94, 97 (1940). Extrinsic fraud is conduct that prevents a real trial upon the issues involved. *O'Meara v. O'Meara*, 181 S.W.2d 891, 893 (Tex.Civ.App.-San Antonio 1944, *writ ref'd*). Intrinsic fraud, on the other hand, is inherent in the matter considered and determined in the trial "where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been litigated therein." *Mills v. Baird*, 147 S.W.2d 312, 316 (Tex.Civ.App.—Austin 1941, *writ ref'd*).

Included in intrinsic fraud are fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed. *Alexander v. Hagedorn*, 148 Tex. at 574, 226 S.W.2d at 1001. It is particularly well-established that the alleged perjury of a witness on a contested issue, which the opposing party had the opportumty to refute, is intrinsic fraud. *Crouch v. McGaw*, 134 Tex. at 637,138 S.W.2d at 96.

Tice v. City of Pasadena, supra; *Alexander v. Hagedora, supra*; *Bristow v. Bristow, supra.*

The fraud which Morgan alleges, that Wanda concealed and lied about her affairs with other men and about the parentage of the three boys bore during their marriage breaching her fiduciary duty to Morgan, is not extrinsic fraud as Morgan contends. These are allegations of intrinsic fraud concerning an issue that was admitted, uncontested, and settled in the divorce proceeding: parentage of the children born of the marriage. *Tice v. City of Pasadena, supra*, *Montgomery v. Kennedy, supra*; *Alexander v. Hagedom,*

supra; *Ortmann v. Ortmann*, 999 S.W.2d 85 (Tex.App.-Houston [14th Dist.] 1999, *pet'n den'd*); *Bristow v. Bristow, supra*; *Shelton v. Ray*, 570 S.W.2d 419 (Tex.Civ.App.-El Paso 1978, no writ).

Morgan also contends that the denial of his petition for bill of review violated his state and federal constitutional rights of due process and equal protection by taking his property in the form of child support and by preventing him from presenting DNA evidence concerning paternity of the three boys. We disagree. Morgan opted not to pursue paternity of any of his children in 1996 even though he was aware of Wanda's "affairs" with at least six men in two different cities, and he voluntarily chose to modify custody and support arrangements in January 1999. The equitable remedy of bill of review is not available to challenge the prior choices a party has made concerning issues which have been litigated and resolved in a final, unappealed judgment. *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe, supra*; *Montgomery v. Kennedy, supra*; *Baker v. Goldsmith, supra*; *Petro-Chemical Transport, Inc. v. Carroll; supra*; *Alexander v. Hagedorn, supra*. Morgan's failure to establish the long-standing requirements necessary to present on a bill of review does not make the denial of his bill of review a denial of his constitutional rights.

Morgan argues that the trial court erred in denying him the opportunity to present a bill of review on behalf of the three boys as next friend. A bill of review must be brought by a party to the challenged judgment or decree. *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe, supra*; *Montgomery v. Kennedy, supra*; *Baker v. Goldsmith, supra*; *Alexander v. Hagedorn, supra*. The children were not parties to the divorce proceedings and, therefore, were not entitled to bring a bill of review proceeding. R.M.H. by *Gabert v. Messick*, 828 S.W.2d 226 (TexApp.-Fort Worth 1992, no writ).

Because the requirements for a bill of review were not met, the trial court did not err in denying Morgan's petition.[1] Morgan's five points of error and his arguments under each point are overruled.

The Judgment of the trial court is a affirmed.

/s/ Jim R. Wright
JIM R. WRIGHT
JUSTICE

April 26, 2001

Publish. See TEX.R.APP.P. 47.3(b).

Panel consists of: Arnot, CJ., and
Wright, J., and McCall, J.

[1] We note that, under similar circumstances, the Massachusetts Supreme Court recently reached the same result. Paternity of Cheryl, No. SJC-08391, 2001 Mass. LEXIS 198 (Mass., April 24, 2001).

11TH COURT OF APPEALS
EASTLAND, TEXAS

No.11-00-00196-CV

MORGAN WISE,	* From the 118th District Court of Howard County, Trial Court No. 99-06-40563.
Vs.	* April 26, 2001
WANDA ELAINE WISE FRYER,	* Opinion by Weight, J. (Panel consists of Arnot CJ., Wright, J., and McCall, J.)

JUDGMENT

This court has inspected the record in this cause and concludes that there is no error in the judgment below. Therefore, in accordance with this court's opinion, the judgment of the trial court is in all things affirmed. The costs incurred by reason of this appeal are taxed against Morgan Wise.

APPENDIX C

IN THE DISTRICT COURT
118TH JUDICIAL DISTRICT
HOWARD COUNTY, TEXAS

No. 99-06-40563A

MORGAN WISE,

VS.

WANDA ELAINE WISE FRYAR.

FINAL JUDGMENT

Came on the 28th day of March, 2000, a hearing was held on the Petitioner's Bill of Review.

I.

Petitioner, Morgan Wise, appeared in person and through his attorney of record, Robert D. Miller, and announced ready.

Defendant, Wanda Elaine Wise Fryar, appeared in person and through her attorney of record, Phyllis Royal, and announced ready.

Defendant, DeWayne Alexander, appeared through his attorney of record, Celia Trimble Boone, and announced ready.

II.

The Court, after hearing and considering the evidence;

IT IS ORDERED ADJUDGED AND DECREED that the Petitioner's relief for Bill of Review is hereby DENIED.

IT IS FURTHER ORDERED AND DECREED that Morgan Wise is denied an order of paternity testing of DeWayne Alexander as the biological father of the minor children, Rowdie Morgan Wise, Marti Eugene Wise and Rauli Tabor Wise.

All other relief not specifically provided herein is denied. All costs of court shall be assessed against the party incurring the same.

SIGNED the 24th day of 2000.

/s/ Robert H. Moore, III
ROBERT H. MOORE, III
JUDGE PRESIDING

APPENDIX D

IN THE DISTRICT COURT
118TH JUDICIAL DISTRICT
HOWARD COUNTY, TEXAS

No. 40563

MORGAN ODIS WISE,

vs.

WANDA ELAINE FRYAR.

CORRECTED FINAL JUDGMENT DENYING MORGAN WISE'S SECOND AMENDED PETITION FOR BILL OF REVIEW

On the 28th day of March 2000, a hearing was held on MORGAN WISE'S Second Amended Petition for Bill of Review filed herein.

I.

Petitioner, MORGAN WISE, appeared in person and through his attorney of record, ROBERT D. MILLER and announced ready.

Defendant, WANDA ELAINE FRYAR, appeared in person and through her attorney of record, PHYLLIS ROYAL, and announced ready.

Respondent, DEWAYNE ALEXANDER, appeared through his attorney of record, CELIA BOONE TRIMBLE, and announced ready.

II.

The Court, after examining the record, hearing the evidence and argument of counsel, finds that MORGAN WISE'S Second Amended Petition for Bill of Review should be DENIED.

III.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that MORGAN WISE'S Second Amended Petition for Bill of Review is hereby DENIED.

IT IS FURTHER ORDERED that all other relief, with the exception of attorney's fees/costs, not specifically granted herein is denied.

/s/ Robert H. Moore, III
ROBERT H. MOORE, III
Presiding Judge
July 5th 2000

APPENDIX E

IN THE DISTRICT COURT
118TH JUDICIAL DISTRICT
HOWARD COUNTY, TEXAS

[Filed Mar. 14, 2000]

MORGAN WISE,

vs.

WANDA ELAINE WISE FRYAR.

SECOND AMENDED PETITION FOR BILL OF REVIEW

NOW COMES, Morgan Wise, individually and as next of friend for Rowdie Morgan Wise, Marti Eugene Wise and Raulie Tabor Wise complaining of Wanda Elaine Wise Fryar and DeWayne Alexander, Defendant's and for cause of action would show:

I.

Morgan Wise is a resident of Howard County, Texas.

Morgan Wise, as next of friend for Rowdie Morgan Wise, Marti Eugene Wise and Rauli Tabor Wise are all residents of Howard County, Texas.

Defendant, WANDA ELAINE WISE FRYAR is a resident of Howard County, Texas.

Defendant, DEWAYNE ALEXANDER is a resident of Taylor County, Texas.

II.

This suit is designated as a Level Two Discovery Control Plan in accordance with Rule 190.2 of the Texas Rules of Civil Procedure.

ALLEGATIONS OF FACTS TO SUSTAIN THIS PETITION FOR BILL OF REVIEW AND ORIGINAL PETITION

The Final Decree of Divorce entered by this court on the 13th day of September, 1996. Less than four years have expired since the entry of the Final Decree of Divorce. The Final Divorce Decree in Cause No. 96-01-038243 reflects that the Plaintiff and the Defendant, WANDA ELAINE WISE FRYAR, are the parents of three minor children, ROWDIE MORGAN WISE, MARTI EUGENE WISE and RAULIE TABOR WISE. At the time of the entry of such divorce decree the Plaintiff had no knowledge that the minor children were not his biological children. By virtue of DNA testing, by report dated March 18, 1999, such tests reflect that the Plaintiff is excluded as the biological father of the children, ROWDIE MORGAN WISE, MARTI EUGENE WISE and RAULIE TABOR WISE. Copies of such reports are attached hereto and marked Exhibit "A", Exhibit "B" and Exhibit "C" and made a part hereof for all purposes. Through subsequent court hearings the Defendant, WANDA ELAINE WISE FRYAR, has disclosed that the alleged biological father of the three minor children is the Defendant, DEWAYNE ALEXANDER.

FIRST CAUSE OF ACTION—BILL OF REVIEW

A. LEGAL REQUIREMENTS OF BILL OF REVIEW

1.

This Plaintiff, Morgan Wise, individually, in filing this Bill of Review states that he has a meritorious defense to the Original Divorce Petition wherein there was a finding that the Plaintiff was the father of the three minor children. Extrinsic fraud and actual fraud was committed upon this Plaintiff by the Defendant, WANDA ELAINE WISE FRYAR, by the acts of the Defendant, WANDA ELAINE WISE FRYAR, in preventing the Plaintiff from availing himself of the timely

opportunity to raise the issue of paternity and was therefore denied a fair opportunity to raise the issue of paternity during the time of trial. As a result of the marriage and confidential relationship existing between Plaintiff and Defendant, WANDA ELAINE WISE FRYAR, a fiduciary relationship existed between Plaintiff and Defendant, WANDA ELAINE WISE FRYAR. Plaintiff to his detriment relied upon this confidential relationship at the time paternity was established of the three minor children. The Defendant, WANDA ELAINE WISE FRYAR, concealed a material fact thus breaching her fiduciary relationship to the Plaintiff in the marriage relationship which existed between the parties in denying to the Plaintiff that the Defendant, WANDA ELAINE WISE FRYAR, had extra-marital affairs during the term of the marriage relationship. Specifically, the Defendant, WANDA ELAINE WISE FRYAR, denied that there had ever been any extra-marital relationships with other parties which resulted in the paternity of the three minor children by other men other than that of the Plaintiff. This concealment of the material fact by the Defendant, WANDA ELAINE WISE FRYAR, breached a fiduciary relationship which she had with the Plaintiff which constituted extrinsic fraud and further prevented the Plaintiff from even knowing of his right to deny paternity pursuant to Section 160.101 of the Texas Family Code.

2.

The Plaintiff will establish that the fraud and the wrongful act of the Defendant, WANDA ELAINE WISE FRYAR, in failing to disclose extra-marital relationship with other men during the marriage relationship and the failure to disclose that the minor children's biological father may be some other person than that of the Plaintiff resulted in a fraud being perpetuated upon this Plaintiff and the Court. Further, Plaintiff had no reasonable way of knowing that such fraud was being committed by Defendant.

3.

This Plaintiff states that the three minor children are not the biological children of this Plaintiff by virtue of DNA testing by report dated March 18, 1999 which reflects that the Plaintiff is excluded as the biological father of the children, ROWDIE MORGAN WISE, MARTI EUGENE WISE and RAULIE TABOR WISE, copies of such reports are attached hereto and marked Exhibit "A", Exhibit "B", and Exhibit "C" and made a part hereof for all purposes. Such reports constitutes prima facie proof of the meritorious defense of this Plaintiff in the Original Petition for Divorce filed by the Defendant, WANDA ELAINE WISE, in cause number 96-01-38243 wherein the Defendant, WANDA ELAINE WISE, as Plaintiff alleged that this Plaintiff, MORGAN ODIS WISE, was the father of the three minor children. But for the extrinsic fraud exercised by this Defendant, WANDA ELAINE WISE FRYAR, upon the Plaintiff this Plaintiff would have timely raised the issue of paternity pursuant to Section 160.101 of the Texas Family Code and Section 3 wherein a man presumed to be the father of a child may contest his own paternity. Such DNA testing constitutes prima facie proof of a meritorious defense to his alleged paternity.

4.

The Plaintiff has met the requirement of presenting prima facie proof of meritorious defense by virtue of the DNA testing as such testing is not barred as a matter of law in the defense in the original proceeding of the Petition for Divorce and this Plaintiff will be entitled to judgment that the three minor children are not the presumed children of this Plaintiff and are thus not born of the marriage and this Plaintiff will be entitled to judgment on retrial if no evidence to the contrary is offered. The prior judgment in the Decree of Divorce was obtained by the Defendant, WANDA ELAINE WISE FRYAR, as a result of fraud and wrongful acts of the Defendant.

5.

A spouse has a fiduciary duty of full disclosure to the other spouse of the assets of the estate. The assets and debts of the community estate are factors taken into consideration to determine the amount of child support to be paid. Therefore, the duty of full disclosure definitely extends to the birth of the children pursuant to the marriage relationship, since a parent is liable to support and provide the necessities for children of the marriage. As the Defendant as wife represents a special trustee, the procreation of children of the marriage relationship, her fraudulent concealment of the paternity of the children and further by the actual perjury of the Defendant at time of the original trial constitutes extrinsic fraud. This fraud of the Defendant upon the Plaintiff was such, in conjunction with her perjured testimony, as to prevent the Plaintiff from presenting upon the trial his legal defense to paternity in the original proceedings. *Montgomery vs Kennedy*, 669 SW2d 309, (Tex-1984), *McMurray vs McMurray*, 4 SW2d 357 (Tex-1887), *State vs Wright*, 56 SW2d 950 (Tex.Civ.App.-Austin, 1933 no writ). The extrinsic fraud of the Defendant upon the Plaintiff is such a fraud which prevented the Plaintiff from knowing about and presenting his legal rights at trial. Attached hereto and made a part hereof is Plaintiff's Sworn Affidavit presenting prima facie proof of the allegations herein contained made a part hereof as Exhibit "D" for all purposes.

The Defendant, Wise breached her fiduciary duty to the children in denying access to the biological father as to his financial assets and the right to inherit from the biological father. In addition, the Defendant, Wise breached her fiduciary duty to the minor children in denying them knowledge of the biological father in so far as the same pertains to medical and/or psychological problems the children may inherit due to genetics. It is in the best interest of the children to have knowledge of their biological father

for medical information. The failure to disclose the biological father to the minor children denies the minor children of their rights of medical information, child support and financial inheritance. The right to standing concerning any tort liability or wrongful death of the biological father is also being denied to the minor children. Plaintiff as next of friend for the minor children and in their behalf seeks the determination of the biological father and the denial of the presumption of paternity of the Plaintiff.

There is no difference between fraud going to the issue of paternity at the time of trial and fraud going to the issue of property at the time of trial. As a matter of fact, it is easier to conceal paternity, thereby making it impossible to fully litigate the issue of paternity at the time of trial than it is to discover hidden assets through discovery requests to secondary sources such as the IRS, accountants, employees, etc.

6.

The Defendant, DEWAYNE ALEXANDER, the alleged biological father, is a necessary party to the original divorce decree and the Suit Affecting the Parent-Child Relationship, and as a necessary party should have been joined into the proceeding. The failure to join the Defendant, DEWAYNE ALEXANDER, results in obtaining a decree which does not dispose of all the issues. The Defendant, DEWAYNE ALEXANDER, is necessary for final adjudication as to the paternity of the minor children as Section 101.024 of the Texas Family Code defines a parent as a man presumed to be the biological father. Failure to join Defendant, DEWAYNE ALEXANDER, in the Original Suit Affecting the Parent-Child Relationship prevents Defendant, DEWAYNE ALEXANDER, from protecting his interest as an alleged biological father. Further, his absence from the suit leaves the parties subject to potential future litigation by Defendant, DEWAYNE ALEXANDER. Texas Rules of Civil Procedure 39A provides for the joinder of all parties and the Texas

Supreme Court in *Vondy v. Commissioners Court*, 620 SW2d 104, 106 (Tex-1981) states that if a party were truly indispensable, it would be fundamental error to proceed in the parties absence. Defendant, DEWAYNE ALEXANDER, is an indispensable party to the final divorce decree, for adjudication must be rendered as to whether or not the Defendant, DEWAYNE ALEXANDER, is truly the biological father of the children.

Further, since all parties were not present, all issues were not resolved at the time of the Divorce and Suit Affecting the Parent-Child Relationship. Such issues as paternity, legal duties and rights of each person determined to be a parent, including child support, visitation inheritance and legal consequences that may result upon the death of a minor child have not been resolved. Therefore, the determination of paternity at the time of divorce is not a final order.

Further, DEWAYNE ALEXANDER, is defined as a parent and is subject to liability pursuant to Section 151.003, Subsection C, which states that "a parent who fails to discharge the duties to support is liable to the person who provides necessaries to those to whom support is owed." By testimony, Defendant, WANDA ELAINE WISE FRYAR, had knowledge at the time of the rendering of the order entered in the Suit Affecting the Parent-Child Relationship of the presumed biological father and failed to joint the presumed biological father into the Suit Affecting the Parent-Child Relationship action, thus the final decree of divorce entered on the 13th day of September, 1996, does not constitute a final order in the suit affecting the parent-child relationship. It must be stated that the law only recognizes that the children born of a marriage it is only presumed to be the child of the father of the husband to the marriage and that such presumption is rebuttable.

Section 151.002 of the Texas Family Code violates the Equal Right Amendment and is unconstitutional. The

legislature stating that the of the child born of the marriage that the husband is the presumed father places a greater burden and assigns a status due to sex without due process. Such statement is discriminating against a class, namely, husbands, due to the marital status and for no other reason. The husband of a mother of a child born of the marriage can only determine if he is the father of the child through DNA testing. Making him the presumed father unfairly discriminates in violation of the Texas Equal Rights Amendment. No comparable presumption is imposed upon the mother for the simple fact that the mother has knowledge that the child is born of the mother. Section 150.002 is further unconstitutional for the reason that at no time can a husband of a mother of a child born of the marriage be a biological father of such child if in truth in fact through scientific testing he is not the biological father. As in this case the Plaintiff was the husband of the mother of the child born during the marriage and the law has presumed that he is a biological father when in truth in fact through DNA testing he is not the biological father and at no time in the present or in the future can he ever become a biological father for it is scientifically impossible when he did not procreate the children. Finding that he is a biological father is thus impossible and ludicrous.

B. CONSTITUTIONAL PRINCIPLES AFFECTING BILL OF REVIEW

1.

The failure to grant a Bill of Review in this matter shall constitute the violation of the United States Constitution and the State Constitution. Specifically, the 14th Amendment to the United States Constitution states that no person may be deprived of life, liberty or property without due process of law. Texas State Constitution under Article 1, Section 3, 13, 19 further contains a comparable guarantee that there shall be no deprivation of life, liberty or property or disinfringement

except by due course of law. The equal protection clause of the 14th Amendment to the United States Constitution provides that all individuals are equal before the law and shall be afforded equal protection under the laws as established not only by statutory laws but by our common law principles.

2.

Consideration of our constitutionally protected concepts of due process of law and equal protection law is specifically applicable to the Plaintiff herein. As a result of the DNA testing it has been determined that the Plaintiff is not the biological father of the minor children. The Defendant Wise had testified under sworn testimony that the Plaintiff and the Defendant were the parents of the three minor children when in fact Defendant Wise knew or should have known that such allegations were false and the presentation of such evidence was false at the time the Defendant presented such evidence. The Defendant Wise knew such allegations were false and perpetuated this fraud upon the Court. Further, Plaintiff had no knowledge of the falsity of such statements and did not possess any reasonable belief at the time upon which to raise the issue of paternity. Therefore, he did not have an opportunity to contest the paternity of the three minor children at the time of the suit affecting the parent-child relationship. Plaintiff had no reason whatsoever to timely raise the issue of paternity.

Further, pursuant to Section 161.110(g) of the Texas Family Code, paternity of the presumed biological father of a child may be contested at any time during the minority of the child by a presumed father, the biological mother of the child, a governmental entity authorized agent or licensed child placing agency, and a person who is related within the second degree of consanguinity to the biological mother of the child if the biological mother of the child is deceased. Reading this Section alone the presumed father i.e. the Plaintiff herein can file a suit contesting the presumption that he is the biological

father of the child at any time during the minority of the child. Plaintiff being defined as a presumed father under Section 151.002. However, Section 160.007 states that such a suit is barred if there is a final judgment rendered by a court adjudicating a named individual to be a biological father of the child. Plaintiff herein has not been adjudicated a biological father but has only been adjudicated a father of the child as stated in the Divorce Decree. Such Decree only states that they are the parents of the children. Section 160.007 is unconstitutional and violates the Equal Rights Amendment so far as it pertains to Morgan Wise as a presumed father for the reason stated above that Morgan Wise can never be a biological father of a child as defined by the Statute. It is a scientific impossibility and further the Divorce Decree did not adjudge him as a biological father. Section 160.007 is thus unconstitutional should the same be applicable to the Plaintiff herein stating that he is a adjudicated biological father or if such Section is read that the Divorce Decree states that he is a parent of the children. There is thus greater discrimination against the husband of the mother of a child born of the marriage than that of mother. Section 161.110(g), violates the equal rights amendment of the Texas Constitution Article 1 §3a because it does not give the presumed father the right to challenge paternity but does give the biological mother the right to contest paternity.

3.

Should the Defendant Wise be afforded the protection of the Court in perpetuating this fraud and not acknowledging the truth as the truth has now been determined is to deny this Plaintiff equal protection under the laws and shall constitute a depravation of property of the Plaintiff without due process of law. Comparing the DNA testing for the biological father of the child would be likened to the DNA testing presented in the criminal court system. In such system

when individuals have been found guilty of crimes and sentenced and incarcerated and then upon DNA testing such testing is revealed that such individual could not have been the perpetuator of such crime, the Court's have reversed such convictions and have released the defendant from incarceration. DNA testing has not only proved guilt beyond a reasonable doubt it has also proved innocence.

4.

Such DNA testing should be afforded the same recognition within the civil courts system. Failure to recognize results of such DNA testing after a final Divorce Decree only denies one the equal protection of the laws as preserved by the United States Constitution. It would further result in depriving the Plaintiff of property without due process of law for now such Plaintiff is ordered to make child support payments for children which are biologically not his for which there is a taking of property without due process of law. Further, this Plaintiff is denied the equal protection of the law for this Plaintiff has been denied the right to present evidence of the non-paternity of the children when in other instances the Attorney General of the State of Texas can proceed against biological fathers of children for the collection, of the child support. If the Attorney General of the State of Texas has the right to proceed in such action, likewise the Plaintiff has a right conversely to use the DNA testing for his protection. He is thus denied the applicability of using such evidence to correct a wrong. The legal system should only foster truth and full disclosure and not the denial of such truths and to perpetuate a wrong upon the Court system and upon an innocence person as the Plaintiff.

The Plaintiff is further denied equal protection of the law if he is denied the right to contests paternity for the reason that the law recognizes that probate litigation a child is provided the right to contest the presumed paternity of the husband of the mother of the child born during the marriage. Such child

has been afforded standing to seek inheritance from the biological father notwithstanding that such child was born of a marriage which ended in divorce stating that the child was born of the husband.

5.

Conceivably, this Plaintiff may be denied liberty if a contempt order for failure to pay child support. Again, equal protection and due process of law is denied by the exclusion of DNA evidence and the failure to correct a divorce fraudulently obtained.

As the courts have recognized DNA testing to exclude alleged non-biological father and recognized Section 160.106 of the Texas Family Code, likewise the same perception of such statute should apply in this case. *In the Interest of B__M__,a child*, 570 SW2d 493 (Tex.Civ.Ap. Texarkana August 22, 1978).

Section 160.007 of the Texas Family Code provides only a limited recourse to deny paternity after final judgment. This Statute is unconstitutional for it does not grant the right of DNA testing after a final judgment, i.e. Divorce Decree, which has adjudicated the presumed father as a biological father of a child. This Statute fails to address the facts of this case which did not adjudicate a biological father but only the presumption of the father by a child from a marriage. The Plaintiff, Morgan Wise is then by this Statute denied due process of law and equal protection of law.

6.

The failure to grant a bill of review in this matter shall also constitute a violation of Texas Equal Rights Amendment Article 1, Section 3A, which states: "equality under the law shall not be denied or abridged because of sex, race, color, creed, or natural origin. This amendment is self operative". DNA testing is afforded to mothers in seeking child support from alleged biological fathers and are afforded the rights

under the Texas Family Code for paternity testing. The Plaintiff is likewise entitled to equal treatment in the ability to prove that the minor children are not his biological children and thus should be no discrimination to the Plaintiff as the father denying paternity for which Section 160.007 of the Texas Family Code does not address.

Further, the portion of the decree with respect to child support is unconstitutional under the Equal Rights Amendment. Defendant, Wanda Elaine Wise Fryar is a parent as a result of being the biological mother of the children the subject of this suit. There was no finding as to the ability of Defendant Wanda Elaine Wise Fryar to pay child support and since the rendition of the Decree of Divorce. Defendant, Wanda Elaine Wise Fryar has failed to support the children the subject of this suit. Defendant Wise, chooses not to support the children and has no physical or mental disabilities that would prevent her from support the children the subject of this suit.

C.

PETITION TO ESTABLISH PATERNITY

Pursuant to Section 160.101(a)(3) of the Texas Family Code, Plaintiff, a man presumed to be the father of a children under Section 151 of the Texas Family Code may contest his own presumed paternity. This suit is not barred by Section 160.007(a)(1) as a final order adjudicating an individual to be the biological father has not been properly entered. Further, this suit is timely under Section 160.007(b) as it is filed during a direct attack on a judgment under 160.007(a)(1).

The presumed biological father of the minor children the subject of this suit is the Defendant, DEWAYNE ALEXANDER.

The Plaintiff and as next of friend of the minor children requests the Court, promptly after the appearance of the Defendant, DEWAYNE ALEXANDER, to order the

Defendant, DEWAYNE ALEXANDER, the mother, WANDA ELAINE WISE FRYAR, and/or the children, whichever is necessary, to submit to parentage testing and to prescribe the arrangements for the tests. Such testing is to comply with Chapter 160 of the Texas Family Code.

Plaintiff requests that, after completion of the parentage testing, the Court order all parties to appear and a pretrial conference to hear to oral testimony or depositions concerning the tests and findings of the testing experts or any parentage testing experts called by any party pursuant to Chapter 160 of the Texas Family Code.

Contingent upon finding that the Defendant, DEWAYNE ALEXANDER, is the biological father of one or more of the three minor children, the Plaintiff individually hereby seeks reimbursement of all child support paid on behalf of such minor child or children and medical expenses which has been provided by the Plaintiff on behalf of the biological father pursuant to Section 151.003(c). Said sums of money sought by the Plaintiff of the Defendant, DEWAYNE ALEXANDER, exceeds the jurisdictional limits of this Court. Plaintiff further seeks future reimbursement of any and all sums of money court ordered to be paid by the Plaintiff for support of the children as well as medical expenses required to be paid by this Plaintiff for the support and necessaries of the minor child or children into the future for which the Plaintiff seeks all restitution from the Defendant, DEWAYNE ALEXANDER.

Plaintiff as next of friend of the minor children seeks the determination of paternity for future child support, and the right of inheritance, and all other legal rights for which a child is entitled from its biological parent.

D.

CIVIL CONSPIRACY AND FRAUD

Plaintiff individually complains that Defendant, WANDA ELAINE WISE FRYAR, and Defendant, DEWAYNE ALEXANDER, committed civil conspiracy in the secreting and deception that the Plaintiff was not the biological father of the three minor children. The Plaintiff alleges that the Defendants acknowledge that the birth of the three minor children as being their children and that such was hidden and secreted from the Plaintiff in order that the Plaintiff would be responsible for all the necessities and expenses associated as a biological father to a child would be required by law to consummate. The civil conspiracy is not only a fraud upon the Plaintiff but also constituted a conversion of property from the Plaintiff by the Defendant, WANDA ELAINE WISE FRYAR, in seeking child support payments and monies. The Plaintiff suffered damages as a proximate result of the civil conspiracy that exceeds the jurisdictional limits of the Court.

In addition to the civil conspiracy the Defendants in secreting the secret of the biological father of the children defrauded the Plaintiff and the Defendant, WANDA ELAINE WISE FRYAR, made material misrepresentation to the Plaintiff that were false. Defendant, WANDA ELAINE WISE FRYAR, knew that these representations were false or made them recklessly with knowledge of the truth and as a positive assertion. Defendant, WANDA ELAINE WISE FRYAR, made these representations with the intention that the Plaintiff would act on them. The Plaintiff acted in reliance on these representations and as a consequence suffered injury and damages that exceeds the jurisdictional limits of the Court.

The Defendant, WANDA ELAINE WISE FRYAR, has defrauded the Plaintiff by breaching a legal and equitable duty owed to the Plaintiff as a result of the fiduciary

relationship. This breach is fraudulent because, irrespective of Defendant, WANDA ELAINE WISE FRYAR's moral guilt, to deceive the Plaintiff and violated the Plaintiffs confidence. Defendant, WANDA ELAINE WISE FRYAR received child support payments and medical payments, all of which exceeds the jurisdictional limits of the Court and shall receive future payments by virtue of her deception for which the Plaintiff seeks damages.

The civil conspiracy by the Defendant, WANDA ELAINE WISE FRYAR, and Defendant, DEWAYNE ALEXANDER, and the fraud as alleged above constitute actual damages to the Plaintiff. Further, these acts were maliciously done for which the law allows the imposition of exemplary damages. The civil conspiracy of the Defendants and the conversion and fraud of the Defendant, WANDA ELAINE WISE FRYAR was intentional, willful, wanton, and without justification or excuse and was done with gross indifference to the Plaintiffs rights. In this connection, the Plaintiff individually would show that as a result of the Defendants, WANDA ELAINE WISE FRYAR and DEWAYNE ALEXANDER, conduct, the Plaintiff has suffered losses of time and other expenses, including attorneys fees incurred in prosecution of this action. Accordingly, the Plaintiff individually prays for exemplary damages against the Defendants.

ATTORNEY FEES

It was necessary for Plaintiff to secure the services of ROBERT D. MILLER, a licensed attorney, to prepare and prosecute this suit. Judgment for attorney's fees and expenses through final judgment, appeal to the Court of Civil Appeals, Petition for Review to the Supreme Court, and if granted, appeal to the Supreme Court of Texas and to the United States Supreme Court, should be granted against Defendants and in favor of Plaintiff for the use and benefit of Plaintiff's attorneys; or, in the alternative, Plaintiff requests that reasonable attorney's fees and expenses through final

judgment and appeal be taxed as costs and be ordered paid directly to Plaintiff's attorney, who may enforce the order for fees in the attorney's own name.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Plaintiff prays that his Petition for Bill of Review be granted and that such portion of the Divorce Decree in Cause number 96-01-38243 dated 13th day of September, 1996 and so far as it states that the three minor children born of the marriage which the Plaintiff was declared the father of such children be set aside and a new hearing be granted in order that this Plaintiff may exercise his right of denial of paternity as provided by Section 160.101 of the Texas Family Code, that the Court makes its findings that the Statutes as alleged herein are unconstitutional in violation of the Texas Equal Rights Amendment, due process of law and the equal protection of law, that the Defendants be ordered to submit to blood testing, and upon final hearing the Court enter an order determining paternity of the children, and that the Plaintiff individually prays for judgment against the Defendants in accordance with the pleadings herein alleged and seeks actual damages and exemplary damages in a sum exceeding the minimal jurisdictional limits of this Court, including actual damages as alleged and exemplary damages, attorney fees and for pre-judgment and post-judgment interest as allowed by law, for costs of court and general relief. Plaintiff prays for reasonable attorney fees as pled herein for the prosecution of this cause as well as, the attorney fees necessary for the appeal of this cause to all higher courts as pled herein and for such other and further relief to which this Plaintiff may show himself justly entitled.

Respectfully submitted,

/s/ Robert D. Miller
ROBERT D. MILLER
608 Scurry
Big Spring, TX 79720
915/267-7449
FAX 915/267-1043
State Bar No. 14108500

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above was served on Phyllis Royal, P.O. Box 4774, Odessa, Texas 79760-4774, Celia Trimble Boone, P.O. Box 2797, Abilene, Texas 79604, by certified mail return receipt requested and John Rheinscheld, 306 Scurry, Big Spring, Texas 79720 by hand delivery in accordance with the Texas Rules of Civil Procedure on this the 14 day of March, 2000.

/s/ Robert D. Miller
ROBERT D. MILLER

EXHIBIT "A"

[Logo]

DNA
DIAGNOSTICS CENTER

DNA Parentage Test Report

Report Date 3/18/99

Case 35822 Name DoB – Race Date Collected Test No.	MOTHER Not Tested	CHILD Rowdi Morgan Wise 1/20/89 3-8-99 35822-20	Alleged FATHER Morgan Odis Wise 3/13/62 caucasian 3-8-99 35822-30
Results	Allele Sizes	Allele Sizes	Allele Sizes
D2S44		1.91	1.56
pYNH24		1.59	1.50
PI 0.00			
D4S163		8.18	5.73
SU604		4.52	4.97
PI 0.00			
D6S132		3.21	3.34
SU1090		2.69	2.69
PI 1.18			
D7S467		5.36	4.68
PAC415		3.19	3.75
PI 0.00			

Interpretation Combined Paternity Index 0 Probability of Paternity 0%

The alleged father, Morgan Odis Wise, is excluded as the biological father of the child named Rowdi Morgan Wise. The alleged father lacks the genetic markers that must be contributed to the child by the biological father. Based on testing results obtained from DNA probes: D2S44, D4S163, and D7S467, the probability of paternity is 0%.

Subscribed and sworn before me on Tuesday, Marcy 18, 1999

/s/ Edward Harris
EDWARD HARRIS
Notary Public, State of Ohio
[SEAL]

My commission Expires July 23, 2003.

I, the undersigned, verify that the interpretation of results is correct as reported, and the testing procedure was conducted in accordance with the recommended guidelines for DNA testing set forth by AABB.

/s/ Susannie C. Lee
SUSANNIE C. LEE, Ph.D.
Associate Director

EXHIBIT "B"

[Logo]

DNA
DIAGNOSTICS CENTER

DNA Parentage Test Report

Report Date 3/18/99

Case 35822 Name DoB – Race Date Collected Test No.	MOTHER Not Tested	CHILD Marti Eugene Wise 3/1/91 3-8-99 35822-21	Alleged FATHER Morgan Odis Wise 3/13/62 caucasian 3-8-99 35822-30
Results	Allele Sizes	Allele Sizes	Allele Sizes
D2S44 pYNH24 PI 0.00		2.91 2.80	1.56 1.50
D4S163 SU604 PI 0.00		6.76 4.52	5.73 4.97
D6S132 SU1090 PI 1.14		3.13 2.69	3.34 2.69
D7S467 PAC415 PI 0.00		3.19 1.62	4.68 3.75

Interpretation Combined Paternity Index 0 Probability of Paternity 0%

The alleged father, Morgan Odis Wise, is excluded as the biological father of the child named Marti Eugene Wise. The alleged father lacks the genetic markers that must be contributed to the child by the biological father. Based on testing results obtained from DNA probes: D2S44, D4S163, and D7S467, the probability of paternity is 0%.

Subscribed and sworn before me on Tuesday, Marcy 18, 1999

/s/ Edward Harris
EDWARD HARRIS
Notary Public, State of Ohio
[SEAL]

My commission Expires July 23, 2003.

I, the undersigned, verify that the interpretation of results is correct as reported, and the testing procedure was conducted in accordance with the recommended guidelines for DNA testing set forth by AABB.

/s/ Susannie C. Lee
SUSANNIE C. LEE, Ph.D.
Associate Director

EXHIBIT "C"

[Logo]

DNA
DIAGNOSTICS CENTER

DNA Parentage Test Report

Report Date 3/18/99

Case 35822 Name DoB – Race Date Collected Test No.	MOTHER Not Tested	CHILD Rauli Tabor Wise 8/31/91 3-8-99 35822-22	Alleged FATHER Morgan Odis Wise 3/13/62 caucasian 3-8-99 35822-30
Results	Allele Sizes	Allele Sizes	Allele Sizes
D2S44 pYNH24 PI 0.00		2.80 1.59	1.56 1.50
D4S163 SU604 PI 0.00		3.23 2.03	5.73 4.97
D6S132 SU1090 PI 2.90		3.34 2.69	3.34 2.69
D7S467 PAC415 PI 0.00		5.36 4.91	4.68 3.75

Interpretation Combined Paternity Index 0 Probability of Paternity 0%

The alleged father, Morgan Odis Wise, is excluded as the biological father of the child named Rauli Tabor Wise. The alleged father lacks the genetic markers that must be contributed to the child by the biological father. Based on testing results obtained from DNA probes: D2S44, D4S163, and D7S467, the probability of paternity is 0%.

Subscribed and sworn before me on Tuesday, Marcy 18, 1999

/s/ Edward Harris
EDWARD HARRIS
Notary Public, State of Ohio
[SEAL]

My commission Expires July 23, 2003.

I, the undersigned, verify that the interpretation of results is correct as reported, and the testing procedure was conducted in accordance with the recommended guidelines for DNA testing set forth by AABB.

/s/ Susannie C. Lee
SUSANNIE C. LEE, Ph.D.
Associate Director

EXHIBIT "D"

AFFIDAVIT

STATE OF TEXAS

COUNTY OF HOWARD

Before me, the undersigned authority, on this day personally appeared Morgan Wise and upon his oath stated as follows:

"I am the Plaintiff in the above entitled cause. I am above the age of 18 years and competent to make this affidavit. At the time of the granting of the Divorce Decree, for which my ex-wife Wanda Elaine Wise Fryar was the Petitioner, dated the 13th day of September, 1996, I had no knowledge or even any possibility of such knowledge or any acts which would confirm that I was not the biological father of the three minor children, Rowdi Morgan Wise, Marti Eugene Wise and Raulie Tabor Wise. Specifically, I had no knowledge that 9 months prior to the dates of January 20, 1989, March 1, 1991 and August 31, 1992, that my ex-wife was engaged in any extra-marital relationship or involved herself in any activities which would result in the paternity of the three minor children to be other than that of myself. At no time during this period of time, 9 months prior to the birth of the three minor children respectfully, did my ex-wife Wanda Elaine Wise Fryar advise me that she was involved in extra-marital affairs, was seeing other men, or was involved in any relationships with any other man other than myself. On the contrary, Wanda Elaine Wise Fryar at all times stated that I was father of these minor children throughout the entire term of our marriage relationship and even so stated the same at the time of the trial upon the merits of the divorce proceeding for custody of the minor children wherein her perjured testimony stated that I was the father of such children. I relied upon the fiduciary and trust relationship established as man and wife in a marriage relationship at the time the three

minor children were born and by her breach of such fiduciary relationship and the fraud committed upon me I had no knowledge that there was ever a possibility that such children were not the biological children of myself and thus, there was no necessity to deny paternity of such children at the time of the Final Decree of Divorce which was entered on the 13th day of September, 1996.

The minor child, Raulie Tabor Wise suffers with cystic fibrosis. In the medical treatment of such child, it became necessary that a determination be made as to the genetic carrier of the cystic fibrosis and whether or not I myself was such carrier. Genetic screening was conducted wherein it was determined that I was not a carrier of cystic fibrosis which thus raised the issue as to the genetic chain of how such child could suffer cystic fibrosis. It thus became necessary that DNA testing of myself and the minor child to be conducted to rule out that there was any possibility that such minor child was not the biological child of myself. In doing the DNA testing it was as convenient and economical to do DNA testing of all three minor boys to ascertain definitively that all such children were my biological children.

The basis of this DNA testing constitutes the complete defense and grounds for denial of paternity in the original proceeding for divorce and the filing of the Final Decree for Divorce.

This fraud which was exercised upon me is not the result of any negligence upon my part for at no time were there ever any fact or statements made prior to the entry of this Divorce Decree that raised any suspicion that I was not the biological father of the children. There was no necessity for DNA testing for there was no request by any medical doctor to do such testing as subsequently occurred.

/s/ Morgan Wise
MORGAN WISE, Affiant

SIGNED AND SWORN TO before me on 16 day of June, 1999.

/s/ Marty Tindol
MARTY TINDOL
Notary Public, State of Texas

[SEAL]

APPENDIX F

IN THE DISTRICT COURT
HOWARD COUNTY, TEXAS
118TH JUDICIAL DISTRICT

In the Matter of the Marriage of

WANDA ELAINE SCROGGINS WISE and MORGAN ODIS WISE

and in the interest of CARLI ANN WISE, ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE, MINOR CHILDREN

STATEMENT OF FACTS
(Temporary Orders Hearing)

APPEARANCES

For The Petitioner: TIMOTHY D. YEATS
Attorney at Law
500 Johnson Street.
Big Spring, Texas 79720

For The Respondent: ROBERT D. MILLER
Attorney at Law
608 Scurry
Big Spring, Texas 79720

BE IT REMEMBERED that on the 25th day of January, 1996, the same being one of the days of the regular January Term, 1996, of the 118th Judicial District Court in and for Howard County, Texas., the above entitled and numbered cause came on for hearing before the Honorable ROBERT H. MOORE, III, Judge for said court, sitting without a jury, taken before KAREN E. FREEMAN, CSR, RPR, Official Court Reporter for said court, whereupon the following proceedings were had:

* * * *

[29]

REDIRECT EXAMINATION

BY MR. YEATS:

Q. Wanda, just a few more questions.

A. Okay.

Q. The attorney questioned you about Joey McMahan. What's your relationship with Joey McMahan?

A. He's a really good friend of mine. I've known him since high school.

Q. On those occasions where you said you—you rode around with Joey before. Is that right?

A. Yes, sir.

Q. Would you tell your husband when that happened?

A. I told him on the first time.

Q. Okay. Have you ever had an extramarital affair with Joey McMahan?

A. No.

Q. Have you ever had an extramarital affair with any man during your marriage?

A. No.

Q. You said you have a lot of men friends. What do you mean by that?

A. Well, I have a lot of girlfriends, too,

* * * *

APPENDIX G

RULES OF CIVIL PROCEDURE

Federal

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(6) any other reason justifying relief from the operation of the judgment.

APPENDIX H

TEXAS FAMILY CODE

§ 160.007. SUIT BARRED.

(a) Except as provided by Subsection (b), a suit under this chapter with respect to a child is barred if final judgment has been rendered by a court of competent jurisdiction:

(1) adjudicating a named individual to be the biological father of the child; or

(2) terminating the parent-child relationship between the child and each living parent of the child; or

(3) granting a petition for the adoption of the child.

(b) During the pendency of an appeal or direct attack on a judgment described by Subsection (a), a suit under this chapter may be filed but shall, on motion of a party, be stayed pending the final disposition of the appeal or direct attack on the judgment.

Supreme Court, U.S.
FILED
NOV 21 200
CLERK

No. 01-562

In The

Supreme Court of the United States

MORGAN WISE,

Petitioner,

v.

WANDA WISE FRYAR,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Eleventh District, Eastland, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals, Eleventh District, Eastland, Texas correctly affirmed the trial court's judgment denying Petitioner's Second Amended Petition for Bill of Review.

II. Whether minor children, who were not parties to their parents' divorce, have standing to prosecute Bill of Review action to overturn finding in parent's Final Decree of Divorce that minor children were born of the marriage.

PARTIES TO THE PROCEEDING

Petitioner is Morgan Wise ("Morgan"). Respondent is Wanda Scroggins, formerly Wanda Wise and Wanda Fryar ("Wanda"). John H. Rheinscheld is attorney ad litem for the minor children.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Wanda Wise Fryar ("Wanda") respectfully submits that the decision below correctly analyzed the facts and applied governing law in the State of Texas, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

The controlling facts are set forth in detail in the opinion of the Court of Appeals. App. 2a-11a. Because the Petition omits several facts, Wanda provides the following supplemental statement as required by Supreme Court Rule 15.2.

Wanda filed for divorce from Morgan on January 10, 1996. Thereafter, Morgan filed a cross-petition for divorce, wherein he alleged to be the father of the four children born of the marriage and sought temporary custody of the four minor children. Morgan was named as the primary custodian with the right to establish the residence of the children by Temporary Orders signed by the trial court on January 31, 1996. After a jury trial ending on July 24, 1996, the jury named Morgan Sole Managing Conservator of the minor children. Morgan participated in and was represented by counsel during a temporary hearing on January 25, 1996, the jury trial regarding custody of the minor children on July 22, 1996 and the final hearing wherein the parties' divorce was granted on September 5, 1996. A Final Decree of Divorce was signed on September 13, 1996.

After Wanda sought and won a modification of the custody of the minor children in an order signed by the trial court on February 3, 1999, Morgan, for unknown reasons, and without the knowledge or sanction of the trial court or Wanda, allegedly had the three boys submit to paternity testing.

Morgan filed his initial Petition for bill of review on June 17, 1999. Subsequently, Morgan filed Individually and as Next Friend for the minor children, his First Amended Petition for bill of review and Original Petition in Suit Affecting the Parent-Child Relationship to Determine Parentage, Fraud, Civil Conspiracy, Motion to Modify Child Support, and Motion for Temporary Orders.

The trial court appointed an Attorney Ad Litem to represent the interests of the minor children and ordered that Morgan and his counsel were precluded from representing the minor children. Morgan then filed, in his individual capacity, his Second Amended Petition for bill of review, which included his Petition to Establish Parent-Child Relationship and claims for civil conspiracy and fraud.

The trial court severed all of Morgan's causes of action concerning tort claims, fraud and conspiracy, and claims filed on behalf of the children from Morgan's Second Amended Petition for bill of review for all purposes. All activity in the severed causes of action was stayed by the trial court until all appellate remedies were exhausted relative to Morgan's bill of review judgment.

The alleged DNA test results were not allowed to be admitted into evidence and Morgan's request for court sanctioned paternity testing was denied. The trial court

further reiterated during the bill of review hearing held on March 28, 2000 that no evidence would be considered other than the testimony presented at the hearing and any alleged DNA would not be considered or ordered unless Appellant's bill of review was granted.

Morgan accused Wanda of numerous "affairs" during the parties' marriage and had knowledge of circumstances prior to the parties' divorce action in 1996 that should have caused him to deny paternity and request paternity testing. His testimony at the bill of review hearing held on March 28, 2000 leaves no doubt that he had knowledge of facts prior to the birth of his first child that should have caused him to contest paternity. Morgan was represented by counsel and as a part of his preparation for his divorce hearing made a list entitled Psychological Abuse that included the following: (Wanda's) affairs in Abilene and (Wanda's) affairs in Big Spring. Morgan also testified that he found a card from Wanda to another man prior to the birth of any of the minor children the subject of his bill of review wherein Wanda offered to leave Morgan if the other man would have her. Morgan was asked at the hearing on his bill of review "if there was anything that would have prevented (him) from – to (his) knowledge, from asking for a paternity test back in 1996 during his divorce hearing?" and he answered " . . . No, ma'am".

The trial court denied Morgan's Second Amended Petition for Bill of Review. The trial court signed Findings of Fact and Conclusions of Law on September 6, 2000 and found, in part: . . . [T]he parties September 13, 1996 divorce decree adjudicating [Morgan] as the legitimate father of [the minor children] is res judicata of the legal

issue of the children's paternity; prior to their September 13, 1996 divorce, [Morgan] alleged to have knowledge of conduct by Wanda that should have caused him to contest paternity; that prior to their September 13, 1996 divorce, [Morgan] accused [Wanda] of having numerous extramarital affairs; that Morgan could have litigated the issue of paternity during the parties' divorce action in 1996; that the failure of Morgan to raise the issue of paternity was a result of his and his counsel's unexcused negligence; and, that there was no extrinsic fraud on behalf of [Wanda] that prevented [Morgan] from contesting paternity of [the minor children] during the parties' 1996 divorce proceedings. App. 1a.

The Court of Appeals, Eleventh District, Eastland, Texas affirmed the trial court's judgment.

The Texas Supreme Court denied Morgan's Petition for Review.

ARGUMENT

I. THE COURT OF APPEALS, ELEVENTH DISTRICT, EASTLAND, TEXAS CORRECTLY AFFIRMED THE TRIAL COURT'S JUDGMENT DENYING MORGAN'S SECOND AMENDED PETITION FOR BILL OF REVIEW.

The Court of Appeal, Eleventh District, Eastland, Texas correctly affirmed the trial court's denial of Morgan's Second Amended Petition for Bill of Review and is not in violation of the Fourteenth Amendment of the United States Constitution. Morgan had an opportunity to deny paternity during the parties' divorce action in

1996 and the Texas Family Code allows him another opportunity by bill of review to directly attack the prior judgment.

Texas Family Code Section 151.002(a)(1) provides that a man is presumed to be the biological father of a child if he and the child's biological mother are or have been married to each other and the child is born during the marriage or not more than 300 days after the date the marriage terminates by death, annulment, or divorce or by having been declared void. App. 6a. Former Section 12.06 (now Section 160.101) of the Texas Family Code, titled Denial of Paternity, was adopted by the Texas Legislature effective September 1, 1983, and provided, in part, that a husband is entitled to deny paternity of a child who is born or conceived during the marriage. Section 160.101(a)(3) further provides that the presumption that a man is the biological father of a child under Chapter 151 may be contested by a man presumed to be the father of the child, who may contest his own or another man's presumed paternity. Both the mother and presumed father can deny paternity of a child born during the marriage. App. 8a. Morgan, by statute, was given the right to deny paternity of the parties' minor children born during his marriage to Wanda. By Morgan's own testimony, he knew of circumstances prior to his divorce in 1996 that should have caused him to contest paternity. Morgan, as a result of his own negligence, failed to raise the issue of paternity during the parties' 1996 divorce proceedings.

Section 160.007(a)(1) of the Texas Family Code bars a paternity suit with respect to a child if final judgment has been rendered by a court of competent jurisdiction adjudicating a named individual to be the biological father of

the child. App. 7a. Morgan's and Wanda's September 13, 1996 Final Decree of Divorce adjudicated him to be the father of the four minor children born during the marriage. However, Section 160.007(b) of the Texas Family Code requires that a paternity suit be stayed during the pendency of a direct attack of the final judgment adjudicating Morgan as the biological father of the minor children. App. 7a. Morgan filed a Petition for Bill of Review to directly attack his Final Decree of Divorce.

The Eleventh District Court of Appeals, Eastland, Texas correctly held that the question before the court is one of procedure. The Texas Supreme Court in *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex. 1979), outlined the trial procedure to be utilized and the burdens of persuasion to be assumed by the respective parties (in a bill of review action) as follows: First, the bill of review complainant must file a petition alleging factually and with particularity that the prior judgment was rendered as the result of fraud, accident, or wrongful act of the opposite party or official mistake unmixed with his own negligence. *Baker* at 408. The complainant must further allege, with particularity, sworn facts sufficient to constitute defense and, as a pretrial matter, present prima facie proof to support the contention. Further, the Court in *Baker* held that the relevant inquiry is not whether "the result would probably be different" on retrial. . . . Rather, a prima facie meritorious defense is made out when it is determined that the complainant's defense is not barred as a matter of law and he will be entitled to judgment on retrial if no evidence to the contrary is offered, which is a question of law for the court. If a prima facie meritorious defense has been shown, the court will conduct a trial and the burden

of pursuasion is allocated in the following manner. The complainant must open and assume the burden of proving that the judgment was rendered as a result of the fraud, accident, or wrongful act of the opposing party or official mistake, unmixed with any negligence of his own. The fact finder will determine whether the complainant has established by a preponderance of the evidence that the prior judgment was rendered as a result of fraud, accident or wrongful act of the opposite party or official mistake unmixed with negligence on the complainant's part. Conditioned on an affirmative finding to this issue, the fact finder will then determine whether the bill of review defendant, the original plaintiff, has proved the elements of his original cause of action. *Baker* at 409.

Later, the Texas Supreme Court, in *Beck v. Beck*, 881 S.W.2d 141 (Tex. 1989) held, "It has long been the rule that a party seeking to invoke a bill of review to set aside a final judgment must prove three elements: (1) a meritorious defense to the cause of action alleged to support the judgment; (2) an excuse justifying the failure to make that defense which is based on the fraud, accident, or wrongful act of the opposing party; and (3) an excuse unmixed with the fault or negligence of the petitioner".

The Texas Supreme Court in *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) held, . . . "that relative to attacks on final judgments, fraud is classified as either extrinsic or intrinsic. Only extrinsic fraud will entitle petitioners to bill of review relief . . . that fraud which denies a losing litigant the opportunity to fully litigate his rights or defenses upon trial", quoting *Alexander v. Hagedorn*, 148 Tex. 565 at 574, 222 S.W.2d 996 (1950) at 1001. "Extrinsic fraud is 'collateral' fraud in the sense that

it must be collateral to the matter actually tried and not something which was actually or potentially an issue in the trial", quoting *Crouch v. McGaw*, 134 Tex. 633, 639, 138 S.W.2d 94, 97 (1940). Intrinsic fraud . . . is inherent in the matter considered and determined in the trial "where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting fraud were, or could have been litigated therein", quoting *Mills v. Baird*, 147 S.W.2d 312, 316 (Tex.Civ.App.-Austin 1941, writ ref'd). It is particularly well established that the alleged perjury of a witness on a contested issue, which the opposing party had the opportunity to refute, is intrinsic fraud. *Crouch*, 134 Tex. at 637, 138 S.W.2d at 96.

In *Amanda v. Montgomery*, 877 S.W.2d 483 (Tex.App.-Houston [1st Dist.] 1994), a mandamus action challenging the court's order for paternity testing, the appellate court held " . . . [that] the trial court abused its discretion in ordering the parties to submit to paternity testing before [the father] fulfilled the preliminary requirements for equitable bill of review". Therefore, the Court ordered Judge Montgomery to sever the bill of review proceeding from the Motion to Modify proceeding and to vacate his order of paternity testing.

Morgan failed to carry his bill of review burden by showing he had a meritorious defense to the issue of paternity of the minor boys that he was prevented from bringing due to fraud, wrongful act or official mistake, unmixed with negligence on his part.

II. THE MINOR CHILDREN, WHO WERE NOT PARTIES TO THEIR PARENTS' DIVORCE, DO NOT HAVE STANDING TO PROSECUTE BILL OF REVIEW ACTION TO OVERTURN FINDING IN PARENTS' FINAL DECREE OF DIVORCE THAT MINOR CHILDREN WERE BORN OF THE MARRIAGE.

The minor children had no right to present a bill of review under the circumstances of this case; therefore, Morgan had no right to present a bill of review on their behalf. Further, the minor children had an Attorney Ad Litem representing their best interests and Morgan and his counsel were prohibited in an order entered on March 16, 2000 from representing the children. Morgan did not file an appeal of that order.

A bill of review must be brought by a party to the challenged judgment or decree. *Alexander v. Hagedorn,* supra; *Baker v. Goldsmith,* supra; *Montgomery v. Kennedy,* supra. The minor children were not parties to the divorce proceedings and, therefore, were not entitled to bring a bill of review proceeding. *R.H.M. by Gabert v. Messick,* 828 S.W.2d 226 (Tex.App. – Fort Worth 1992, no writ).

CONCLUSION

The Petition for Writ of Certiorari fails to demonstrate any valid grounds for review of the decision below on constitutional grounds, and should be denied.

Respectfully submitted,

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Attorney ad Litem for
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APPENDIX

NO. 40563

MORGAN ODIS WISE	§	IN THE DISTRICT
	§	COURT 118TH JUDICIAL
VS.	§	DISTRICT
WANDA ELAINE FRYAR	§	HOWARD COUNTY,
	§	TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of Petitioner, MORGAN ODIS WISE, the Court makes and files the following as original Findings of Fact and Conclusions of Law in accordance with Rules 296 and 297 of the Texas Rules of Civil Procedure.

Findings of Fact/Conclusions of Law

1. At the time of their divorce on September 13, 1996, MORGAN ODIS WISE and WANDA ELAINE FRYAR (formerly WISE), were the parents of the following children under the age of eighteen years:

Name:	CARLI ANN WISE
Sex:	FEMALE
Birthplace:	ABILENE, TEXAS
Birth date:	03/06/85
Home state:	TEXAS
Name:	ROWDI MORGAN WISE
Sex:	MALE
Birthplace:	ABILENE, TEXAS
Birth date:	01/20/1989
Home state:	TEXAS

Name:	MARTI EUGENE WISE
Sex:	MALE
Birthplace:	BIG SPRING, TEXAS
Birth date:	03/01/1991
Home state:	TEXAS
Name:	RAULI TABOR WISE
Sex:	MALE
Birthplace:	BIG SPRING, TEXAS
Birth date:	08/31/1992
Home state:	TEXAS

2. MORGAN ODIS WISE, in his Second Amended Petition for Bill of Review, is denying paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

3. MORGAN ODIS WISE'S defense of nonpaternity is barred as a matter of law by res judicata.

4. The parties September 13, 1996 divorce decree adjudicating MORGAN ODIS WISE as the legitimate father of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE is res judicata of the legal issue of the children's paternity.

5. The finding of fact in the parties September 13, 1996 divorce decree that the minor children were born of the marriage of the parties bars MORGAN ODIS WISE from relitigating the issue of paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

6. The parties September 13, 1996 divorce decree adjudicated the issue of paternity, provided for the custody, child support, and possession of and access to ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

7. The Texas Family Code, as well as established case law, protected MORGAN ODIS WISE's right to contest paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE during the parties divorce proceedings in 1996.

8. Prior to their divorce being granted on September 13, 1996, MORGAN ODIS WISE alleged to have knowledge of conduct by WANDA ELAINE FRYAR that should have caused him to contest paternity.

9. Prior to their divorce being granted on September 13, 1996, MORGAN ODIS WISE accused WANDA ELAINE FRYAR of having numerous extramarital affairs.

10. MORGAN ODIS WISE has no meritorious defense that he was prevented from bringing during the parties divorce proceedings in 1996.

11. MORGAN ODIS WISE could have litigated the issue of paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE during the parties divorce proceedings in 1996.

12. MORGAN ODIS WISE failed to raise the issue of paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE during the parties divorce proceeding as a result of his and his counsel's unexcused negligence.

13. MORGAN ODIS WISE'S Second Amended Petition for Bill of Review alleged only extrinsic fraud.

14. There was no extrinsic fraud on behalf of WANDA ELAINE FRYAR that prevented MORGAN ODIS WISE from contesting paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE during the parties 1996 divorce proceedings.

15. MORGAN ODIS WISE sought and was named Sole Managing Conservator of the parties' minor children and remained Sole Managing Conservator until January 19, 1999.

16. Any finding of fact that is a conclusion of law shall be deemed a conclusion of law.

SIGNED on Sept. 6, 2000.

/s/ Robert H. Moore
JUDGE PRESIDING

CAUSE NO. 99-06-40,563-CV

MORGAN WISE, INDIVIDUALLY AND AS NEXT FRIEND FOR AND IN THE INTEREST OF ROWDIE MORGAN WISE, MARTI EUGENE WISE AND RAULIE TABOR WISE, MINOR CHILDREN	IN THE DISTRICT COURT 118TH JUDICIAL DISTRICT HOWARD COUNTY, TEXAS
VS.	
WANDA ELAINE WISE FRYAR AND DEWAYNE ALEXANDER	

ORDER ON MOTION TO PRECLUDE PETITIONER FROM ACTING AS NEXT FRIEND AND BRINGING ACTION IN THE INTEREST OF THE MINOR CHILDREN AND MOTION TO DISQUALIFY ATTORNEY

On the 16th day of March, 2000, a hearing was held on Attorney Ad Litem's Motion to Preclude Petitioner from Acting as Next Friend and Bringing Action in the Interest of the Minor Children and Motion to Disqualify Attorney.

APPEARANCES

Attorney ad Litem, JOHN H. RHEINSCHELD, appeared in person and announced ready.

Movant, MORGAN ODIS WISE, appeared in person and through his attorney of record, ROBERT D. MILLER, and announced ready.

Respondent, WANDA SCROGGINS FRYAR, appeared in person and through her attorney of record, PHYLLIS ROYAL, and announced ready.

Respondent, DEWAYNE ALEXANDER, appeared through his attorney of record, Celia Trimble Boone, and announced ready.

FINDINGS

The Court finds that Movant, MORGAN ODIS WISE, and Attorney for Movant, ROBERT D. MILLER, should be precluded from representing the children, ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

ORDER

IT IS ORDERED that Movant, MORGAN ODIS WISE, and Attorney for Movant, ROBERT D. MILLER, are precluded from representing the children, ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

All other relief requested but not granted herein is denied.

SIGNED on March 27, 2000

/s/ Robert H. Moore, III
ROBERT H. MOORE, III
Judge Presiding

Texas Family Code

§ 151.002. Presumption of Paternity

(a) A man is presumed to be the biological father of a child if:

(1) he and the child's biological mother are or have been married to each other and the child is born during the marriage or not more than 300 days after the date the marriage terminated by death, annulment, or divorce or by having been declared void;

---

§ 160.007. Suit Barred

(a) Except as provided by Subsection (b), a suit under this chapter with respect to a child is barred if final judgment has been rendered by a court of competent jurisdiction:

(1) adjudicating a named individual to be the biological father of the child; or

(2) terminating the parent-child relationship between the child and each living parent of the child; or

(3) granting a petition for the adoption of the child.

(b) During the pendency of an appeal or direct attack on a judgment described by Subsection (a), a suit under this chapter may be filed but shall, on motion of a

party, be stayed pending the final disposition of the appeal or direct attack on the judgment.

---

§ 160.101. Denial of Paternity

(a) The presumption that a man is the biological father of a child under Chapter 151 may be contested by:

(1) the biological mother of the child;

(2) a person related within the second degree of consanguinity to the biological mother of the child, if the biological mother of the child is deceased;

(3) a man presumed to be the father of the child, who may contest his own or another man's presumed paternity;

(4) a man alleging himself to be the biological father of the child; or

(5) a governmental entity, authorized agency, or a licensed child-placing agency.

(b) A contest of paternity must be raised by an express statement denying paternity of the child in a party's pleadings in the suit, without regard to whether the presumed father or biological mother is a petitioner or respondent.

(c) In a suit in which a question of paternity is raised, the court shall conduct the pretrial proceedings and order scientifically accepted paternity testing as provided by this chapter.